(50)

No. 87-2048-CFX   Title: Texaco, Inc., Petitioner
Status: GRANTED   v.
Ricky Hasbrouck, dba Rick's Texaco, et al.

Docketed: June 14, 1988   Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Schubin,Milton J.

Counsel for respondent: Ebel,John S., Whaley,Robert H.

Entry	Date	Note	Proceedings and Orders
1	Jun 14 1988	G	Petition for writ of certiorari filed.
2	Jul 14 1988	G	Motion of National Association of Texaco Wholesalers for leave to file a brief as amicus curiae filed.
3	Jul 14 1988	G	Motion of Society of Independent Gasoline Marketers of America, et al. for leave to file a brief as amicus curiae filed.
4	Jul 14 1988	G	Motion of Petroleum Marketers Association of America for leave to file a brief as amicus curiae filed.
6	Jul 15 1988	G	Motion of National Association of Manufacturers of the United States, et al. for leave to file a brief as amici curiae filed.
5	Jul 18 1988		Brief of respondents in opposition filed.
7	Jul 20 1988		DISTRIBUTED. September 26, 1988
8	Jul 29 1988		X Brief of Ricky Hasbrouck in response to motions for for leave to file briefs as amici curiae in support of Texaco.
10	Aug 25 1988	X	Reply brief of petitioner Texaco, Inc. filed.
11	Oct 3 1988		Motion of National Association of Texaco Wholesalers for leave to file a brief as amicus curiae GRANTED.
12	Oct 3 1988		Motion of Society of Independent Gasoline Marketers of America, et al. for leave to file a brief as amicus curiae GRANTED.
13	Oct 3 1988		Motion of Petroleum Marketers Association of America for leave to file a brief as amicus curiae GRANTED.
14	Oct 3 1988		Motion of National Association of Manufacturers of the United States, et al. for leave to file a brief as amici curiae GRANTED.
15	Oct 3 1988	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
16	May 16 1989		Brief amicus curiae of United States filed.
17	May 23 1989		REDISTRIBUTED. June 8, 1989
18	Jun 2 1989	X	Brief of petitioner Texaco, Inc. in response to brief of United States as amicus curiae_filed.
19	Jun 12 1989		Petition GRANTED. ***
21	Jul 11 1989		Order extending time to file brief of petitioner on the merits until August 3, 1989.
22	Aug 1 1989	G	Motion of Motor and Equipment Manufacturers Association for leave to file a brief as amicus curiae filed.
23	Aug 1 1989	G	Motion of National Association of Wholesaler-Distributors for leave to file a brief as amicus curiae filed.

No. 87-2048-CFX

Entry	Date	Note	Proceedings and Orders
24	Aug 3 1989	G	Motion of Boise Cascade Corporation for leave to file a brief as amicus curiae filed.
25	Aug 3 1989		Brief amicus curiae of United States filed.
26	Aug 3 1989	G	Motion of Society of Independent Gasoline Marketers of America, et al. for leave to file a brief as amici curiae filed.
27	Aug 3 1989	G	Motion of National Association of Texaco Wholesalers for leave to file a brief as amicus curiae filed.
28	Aug 3 1989	G	Motion of American Petroleum Institute, et al. for leave to file a brief as amici curiae filed.
30	Aug 3 1989	G	Motion of Motor Vehicle Manufacturers Association of the United States, et al. for leave to file a brief as amici curiae filed.
32	Aug 3 1989	G	Motion of Petroleum Marketers Association of America for leave to file a brief as amicus curiae filed.
33	Aug 3 1989		Joint appendix filed.
34	Aug 3 1989		Brief of petitioner Texaco, Inc. filed.
43	Aug 15 1989	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
36	Sep 6 1989		Brief amici curiae of Thirty-Five States filed.
37	Sep 6 1989	G	Motion of National Coalition of Petroleum Retailers for leave to file a brief as amicus curiae filed.
38	Sep 6 1989		Brief of respondents Ricky Hasbrouck, et al. filed.
42	Sep 6 1989	G	Motion of Service Station Dealers of America for leave to file a brief as amicus curiae filed.
39	Sep 11 1989		Brief of respondents Ricky Hasbrouck, et al. in response to motions for leave to file briefs as amici curiae in support of petitioners filed.
44	Sep 25 1989		Motion of Motor and Equipment Manufacturers Association for leave to file a brief as amicus curiae GRANTED.
45	Sep 25 1989		Motion of National Association of Wholesaler-Distributors for leave to file a brief as amicus curiae GRANTED.
46	Sep 25 1989		Motion of Boise Cascade Corporation for leave to file a brief as amicus curiae GRANTED.
47	Sep 25 1989		Motion of Society of Independent Gasoline Marketers of America, et al. for leave to file a brief as amici curiae GRANTED.
48	Sep 25 1989		Motion of National Association of Texaco Wholesalers for leave to file a brief as amicus curiae GRANTED.
49	Sep 25 1989		Motion of American Petroleum Institute, et al. for leave to file a brief as amici curiae GRANTED.
50	Sep 25 1989		Motion of Motor Vehicle Manufacturers Association of the United States, et al. for leave to file a brief as amici curiae GRANTED.
51	Sep 25 1989		Motion of Petroleum Marketers Association of America for leave to file a brief as amicus curiae GRANTED.
52	Sep 25 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

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Entry	Date	Note	Proceedings and Orders
54	Sep 26 1989		SET FOR ARGUMENT TUESDAY, DECEMBER 5, 1989. (3RD CASE)
58	Sep 26 1989		Record filed.
		*	Certified original record received. (11 boxes).
53	Oct 2 1989		Motion of National Coalition of Petroleum Retailers for leave to file a brief as amicus curiae GRANTED.
55	Oct 5 1989		CIRCULATED.
57	Oct 6 1989	X	Reply brief of petitioner Texaco, Inc. filed.
56	Oct 10 1989		Motion of Service Station Dealers of America for leave to file a brief as amicus curiae GRANTED.
59	Dec 5 1989		ARGUED.

87-2048 (1)

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

—*vs.*—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 14, 1988

QUESTIONS PRESENTED

1. Whether the Robinson-Patman Act is violated if a manufacturer merely sells to wholesalers at a lower price than to retailers (so as to enable wholesalers to perform their role of reselling to retailers and earn a profit), unless the manufacturer selling to both levels of trade (wholesale and retail) either:

(a) Discriminates in price among its wholesalers, selling to each wholesaler at a price that would only cover the particular wholesaler's costs (assuming they were determinable), or

(b) Otherwise polices and controls each wholesaler's prices to its retail customers to assure that the wholesaler does not resell to retailers at a lower price than the manufacturer?

2. Whether the *Morton Salt* "self-evident" inference of injury to competition from sales over time to competing customers at different prices (334 U.S. at 50) has any application to the age-old practice of selling to wholesalers at lower prices than to retailers?

3. Under the Robinson-Patman Act and Section 4 of the Clayton Act, where the allegedly favored customer is a wholesaler, the allegedly disfavored customer a retailer, and the purported illegal price discrimination is the discount given all wholesalers, may the retailer predicate injury and recover treble damages on the basis of how much better off he would have been had he too received the wholesaler discount in whole or part?

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LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were petitioner Texaco Inc. and respondents Ricky Hasbrouck, d/b/a Rick's Texaco, James O. Sills, Alva N. Blue, John W. Bevan, Ricky A. Rigg, Gene C. Robinson, Mollie J. Robinson, Albert E. Allen, Harold C. Harwick, Henry Rigg, Vincent Lies, and Ralph O. Webber.

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Riverway Gas Pipeline Company
Texaco Pipeline Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Productos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company

Texaco Trinidad, Inc.
Texas Petroleum Company
Texaco Butadiene Company
Texaco Chemical Company
Texaco Canada Inc.
Texaco Canada Resources Ltd.
Texaco Canada Resources
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

IN THE

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TEXACO INC.,

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—*vs.*—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Amended Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 842 F.2d 1034 and is reprinted as Appendix A. The Opinion of the District Court for the Eastern District of Washington is reported at 634 F. Supp. 34, and is reprinted as Appendix B.

JURISDICTION

The original Opinion of the Court of Appeals for the Ninth Circuit was entered on October 26, 1987. Following a timely petition for rehearing, the court of appeals entered an Amended Opinion on March 17, 1988 and denied the petition for rehearing on that date. The Order denying the petition for rehearing is set forth as a preface to the Amended Opinion. (A-4).[1]

This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

1 References to "A" are to Appendix A, the Court of Appeals Opinion; references to "B" are to Appendix B, the District Court Opinion; references to "ER" are to the Excerpts of Record in the Court of Appeals.

STATEMENT OF THE CASE

The critically important issue raised by this case is whether a claim of unlawful price discrimination under the Robinson-Patman Act can be maintained by retailers against a manufacturer because the manufacturer sells to its wholesalers at a lower price than it charges the retailers. The court of appeals answered the question as follows:

> "That all wholesalers were offered the same discount would be an appropriate defense in a case where the plaintiff and other customers of the defendant were all wholesalers performing at the same level in the chain of distribution. *Here, however, only the other customers are wholesalers; the plaintiffs are retailers* who are further down the chain of distribution. The injury occurs at the latter level and results from the receipt by wholesalers of a functional discount in excess of the value of the services they perform, all or a portion of which they then pass on to the retailers they supply.
>
> * * *
>
> Despite the fact that Dompier and Gull, at least in their capacities *as wholesalers, did not compete directly with Hasbrouck*, a section 2(a) violation may occur if (1) *the discount they received was not cost-based* and (2) *all or a portion of it was passed on* by them to customers of theirs who competed with Hasbrouck." (A-7 to A-8) (emphasis added).

The court went on to find a violation by Texaco under the standard it had enunciated. In doing so, the court expressly noted its strong disagreement with the contrary view expressed by the Federal Trade Commission:

> "[I]f the position of the Federal Trade Commission is that charging lower prices to a wholesaler than to a retailer can never support a claim under the Act, *see Matter of Boise Cascade Corp.*, 50 Antitrust & Trade Reg. Rep. (BNA) 335, 336 (FTC Feb. 11, 1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988), we strongly disagree." (A-9).

In addition to its importance as a matter of antitrust law, the court of appeals' resolution of the question is of enormous practical consequence since it goes to the very heart of the marketing system employed by most manufacturers in this country. If allowed to stand, the decision below imperils the continued stability of wholesaling. The issue presented is thus of exceptional national significance meriting review by this Court.

A. Statement of Facts

Respondent Hasbrouck and eleven other retail service station owners ("Hasbrouck" or "plaintiffs") in the Spokane area purchased gasoline directly from petitioner Texaco Inc. ("Texaco") and resold it at retail under the Texaco trademark. (A-4). During the relevant period (1972 to 1981), Texaco also sold gasoline in the Spokane area to two independent wholesalers, who resold that gasoline to independent retail service stations. (A-5). One such wholesaler, Dompier Oil Company ("Dompier"), sold the gasoline to retailers under the Texaco trademark. (*Id.*)[2] It is the sales to Dompier, and then by Dompier to its customers, and then by those customers to the motoring public, that are the subject of this claim of price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13(a).

The wholesaler and retailers operated at different functional levels and were not competitors.[3] Plaintiffs, however, claimed to be impacted by the lower price charged the wholesaler—from 2.65 cents to 3.95 cents per gallon lower than retail. (ER 33 at

2 The other wholesaler, Gull Oil Company, did not resell under the Texaco brand. (A-5). Hasbrouck did not seek any damages for Texaco's prices to Gull (B-15; ER 386, 424-25), and no Gull stations were alleged to have caused compensable damages to any plaintiff. Texaco's sales to Gull are thus not of present significance.

3 Thirty months into the damage period, Dompier, in addition to being a wholesaler, acquired its first retail service station and then over the years acquired a few others (B-4 n.4), continuing to act as a pure wholesaler to twelve independent retailers (ER 34-35). Plaintiffs did not distinguish between these two periods, conceding that *if* it was lawful for Texaco to sell to Dompier at the price charged all wholesalers during the thirty month period in which Dompier was nothing but a wholesaler, judgment must be for Texaco. (ER 529-30).

¶ 25). At times, Dompier independently[4] decided to sell to some of its retail service station customers at prices below those Texaco was then charging its direct-supplied retailer customers,[5] and thus passed along some or all of the wholesaler discount to its customers. These independent retailers in turn sometimes sold to the motoring public at lower prices[6] (although never less than "two to three cents higher than the price Hasbrouck paid Texaco" (A-9)), thereby arguably passing along some or all of the original wholesaler discount to the public.

Texaco was just one of many gasoline sellers in Spokane and, concededly, competitive intensity increased over the 1972-81 period. (ER 165, 178, 236-41, 288-89, 295-96, 334). Plaintiffs acknowledged that their businesses were injured by, among other things, entrance into the market of new, high-volume self-serve or mini-serve stations (ER 186B, 230, 303-08), the advent of higher mileage-per-gallon automobiles (ER 402), and entrance into the market of well-known entities, such as Sears or Midas Mufflers (ER 403A-03B).

4 Apart from giving Dompier the discount it gave all wholesalers, there was no claim that Texaco had any responsibility for Dompier's pricing decisions.

5 At other times, Dompier charged the same as, or more than, Texaco charged Hasbrouck. (Ex. 5401). For example, exhibit 5401 shows that between February 1974 and June 1979, plaintiffs paid Texaco less than or the same as the price paid by Dompier's retail customers to Dompier at least 82% of the time.

6 At trial, plaintiffs conceded that, absent any price discrimination, the marketplace demanded a 4 to 10 cent retail price differential between full service and self-service gasoline. (ER 242-43, 306, 405-09). Stations supplied by Dompier resold their gasoline at self-service or mini-service facilities and, not surprisingly, at 4 to 10 cents below the full service prices charged at the full service stations operated by the plaintiffs. (ER 155-62, 191-94, 200-09, 213, 219, 242-43, 298, 302, 306, 311-12, 315, 405-09). It was these self- and mini-service prices of Dompier customers that were contrasted at trial with the plaintiffs' full service prices. (ER 393).

B. Prior Proceedings

The Complaint was filed on January 30, 1976. Following trial in the United States District Court for the Eastern District of Washington in which the jury found for plaintiffs, the district court, on March 26, 1980, granted Texaco's motion for judgment n.o.v. *Hasbrouck* v. *Texaco Inc.*, 1980-2 Trade Cas. (CCH) ¶ 63,343 (E.D. Wash. 1980). The district court (per Callister, J.) found that the amount of discrimination was not a proper measure of damages, and that the holding to the contrary in *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), had been implicitly overruled by this Court in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), and was no longer the law. Following Judge Callister's decision, this Court, in *J. Truett Payne* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), expressly rejected "automatic damages" in price discrimination cases on the basis of *Brunswick*, as Judge Callister had correctly recognized.

The court of appeals nevertheless reversed and remanded for a new trial, taking the view that Judge Callister had to follow *Fowler* until this Court's *J. Truett Payne* decision. *Hasbrouck* v. *Texaco Inc.*, 663 F.2d 930 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).

At the new trial, which commenced before Judge Quackenbush on June 4, 1985, the damage period was extended to cover 1972 through 1981. Plaintiffs conceded that if Texaco's conduct was lawful for any portion of the 1972-1981 period—including the period before July 1974 when Dompier functioned solely as a wholesaler—judgment was to be entered for Texaco. (ER 529-30). The district court, *inter alia*, permitted the jury to find injury and damages on the basis of the plaintiff-retailers not receiving the wholesaler discount. The district court denied motions for judgment notwithstanding the verdict or a new trial (Appendix B) and judgment was entered for threefold the verdict, $1,349,700. The court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. Until the decision below, it was lawful to sell to wholesalers below the price charged retailers. The decision puts in question the normal pricing practices of countless businesses across the country and jeopardizes the continued role of wholesalers in the American economy. It is thus of exceptional national importance, meriting the grant of certiorari.

Heretofore, a supplier was in compliance with the Robinson-Patman Act if it sold to retailers at a uniform retailer price and sold to wholesalers at a uniform wholesaler price that was lower. Now, for the first time in the more than fifty-year history of the Robinson-Patman Act, a supplier is held liable for *not* discriminating in price among its wholesalers.[7] Treble damage liability is imposed on the supplier for injuries caused by the decisions of an independent wholesaler and its independent retailer-customers to lower their own prices—decisions which the supplier may not control without violating the Sherman Act, 15 U.S.C. § 1.

In calling for suppliers to sell at different prices within the wholesale level of trade based upon each wholesaler's costs, the decision departs from established precedent, from practicality, and from Congressional intent, and conflicts with the decisions of the Federal Trade Commission and of other Circuits, including the recent decision of Judge Arnold in *White Industries, Inc.* v. *Cessna Aircraft Co.*, 1988-1 Trade Cas. (CCH) ¶ 67,992 (8th Cir. 1988).

2. The decision of the court of appeals also merits review by this Court because it conflicts with the recent majority opinion of the Court of Appeals for the District of Columbia in *Boise*

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7 The court of appeals took the position that while a supplier that sells to all wholesalers at a uniform price is insulated from price discrimination claims by any wholesaler, treating wholesalers equally can violate the Robinson-Patman Act if the plaintiff is a retailer. Under the Ninth Circuit view, if the plaintiff is a retailer, the supplier may be guilty of price discrimination unless the supplier can show it discriminated in its prices among wholesalers on the basis of each wholesaler's varying costs of doing business. (A-7 to A-9).

Cascade Corp. v. *FTC*[8] with regard to the increasingly important and controversial question of how the statutory requirement of competitive injury is to be established where the favored and disfavored purchasers are not entirely on the same level of trade. In *Boise Cascade*, the favored customer was a "hybrid," receiving a wholesaler discount but selling at both the wholesale and retail levels. The majority of the D.C. Court of Appeals held that this Court's *Morton Salt*[9] "self-evident" inference of injury from long-standing and significant discrimination between purchasers competing at the same level of trade should not be mechanically applied. Instead, it required consideration, as well, of evidence that the price differential actually adversely affected competition in the context of the peculiar facts of that industry. Because the favored customer was not just a retailer but also at least in part, a wholesaler, "[t]his case is simply not of the lineage of *Morton Salt*." 837 F.2d at 1139 n.14.

Here, where Robinson-Patman liability was sought to be imposed for the traditional practice of selling to a pure wholesaler at lower prices than to retailers, plainly no "self-evident" inference of lessening of competition may be drawn. Yet, in co. ast to *Boise Cascade*, the court below mechanically misapplied the *Morton Salt* inference and held that a reasonable possibility of injury to competition could be found from sales over time to wholesalers at lower prices than retailers.[10]

3. Also compelling review is the reintroduction of "automatic damages" by the Ninth Circuit in the face of the emphatic rejection of such a basis for recovery by this Court.[11]

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8 837 F.2d 1127 (D.C. Cir. 1988).

9 FTC v. Morton Salt Co., 334 U.S. 37, 50 (1948).

10 "It is undisputed that a price differential existed between the rate Texaco charged Hasbrouck [the retailer] and the rate it charged Dompier and Gull [the wholesalers]. Furthermore, there was evidence that the price differential was substantial and it was in effect for several years. There can be little doubt that Texaco's pricing policy constituted price discrimination that was unlawful unless it could be justified under the Act." (A-11 to A-12).

11 J. Truett Payne v. Chrysler Motors Corp., 451 U.S. 557 (1981).

Indeed, the damages below exceeded the measure of "automatic damages"—the difference between the prices paid by Hasbrouck and those paid by his competitors, Dompier-supplied retailers (to whom Dompier at times may have passed along some portion of its wholesaler discount). Rather, the jury was allowed to find that the plaintiff-retailers were injured to the full extent of the discount given the wholesalers. Unless the damage approach below is corrected, it may well be pursued in every Robinson-Patman case, with the potential for wholly unwarranted, enormous recoveries.

I. It Is Not Illegal for a Supplier to Sell to Wholesalers at a Uniform Wholesaler Price Lower than Its Price to Retailers.

Throughout the history of the Robinson-Patman Act, it has been recognized that wholesalers require lower prices than retailers (to enable them to perform their function of reselling to retailers and earn a profit) and that compliance with the Act is assured by selling to all purchasers in the wholesale class of trade at a uniform price that is not higher than the price to retailers. This is exemplified by the very Order affirmed by this Court in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), which prohibited different prices among wholesalers and among retailers, but allowed different pricing between the two levels of trade so long as retailers were not charged less than wholesalers.[12]

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12 "The prohibiting paragraphs of the order were:

'(a) By selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.

'(b) By selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five

This Court, in *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1963), succinctly summarized Congressional intention in enacting the Robinson-Patman Act:

> "In short, Congress intended to assure, to the extent reasonably practicable, that businessmen *at the same functional level* would start on equal competitive footing so far as price is concerned." 371 U.S. at 520 (emphasis added).[13]

It has always been fundamental that businesses at higher functional levels could, and necessarily would, start at lower price footings.[14] Responding to the obvious importance of having a clear demarcation line between the lawful and the unlawful to permit normal structuring of distribution arrangements, the Federal Trade Commission (the agency with principal responsibility for Robinson-Patman enforcement) and the courts have firmly drawn such a line—so long as a wholesaler is acting as a wholesaler (selling to retailers):

> "the difference in the prices that the wholesaler and retailer pay *cannot support* a claim of secondary line competitive injury under the Act." (emphasis added).[15]

cents per case which do not tend to lessen, injure, or destroy competition among such retailers.

'(c) By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer.' " 334 U.S. at 51 n.19.

13 See also Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976) ("focus of Robinson-Patman is on competition 'at the same functional level' ").

14 "[T]he competitive effects requirement permits a supplier to quote different prices between different distributor classes—so long as those who are higher up (nearer the supplier) on the distribution ladder pay *less* than those who are further down (nearer the consumer)." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 174 (1962) (emphasis in original).

15 Boise Cascade Corp., [1983-87 FTC Complaints and Orders Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,330 at p. 23,394 (1986). In reversing the Commission's expansive view of the competitive injury standard, the Court of Appeals cast no doubt on the above. Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988). *See also*, with respect to the clear legality of selling to wholesalers at less than to retailers, White Industries, Inc. v. Cessna Aircraft Co., 1988-1 Trade Cas. (CCH) ¶ 67,992 (8th Cir. 1988); Edward J. Sweeney & Sons, Inc. v. Texaco Inc., 637 F.2d 105, 120-22 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1024 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

It is this very clarity that the court below explicitly undermines (A-9 to A-10) by establishing a rule of law under which a supplier could never know whether its sales to wholesalers were lawful because legality would depend on what the supplier could neither know nor control—each wholesaler's "costs" and independent pricing decisions.

Moreover, the holding that a supplier should discriminate among its wholesalers on the basis of wholesaler "costs" flatly conflicts with long-established legal principles.[16] The recent opinion of Circuit Judge Arnold writing for the Eighth Circuit Court of Appeals is directly on point:

> "The Robinson-Patman Act proscribes discriminatory pricing, not pricing which fails to discriminate between [purchasers] with unequal costs at the same level of distribution." *White Industries, Inc.* v. *Cessna Aircraft Co.*, *supra*, 1988-1 Trade Cas. (CCH) at p. 58,086 n.4.[17]

16 *E.g.*, Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) (cost-based price differences within same level of trade are discriminatory).

17 In *White Industries*, the dealer urged, *inter alia*, that lower prices to distributors were discriminatory because they impaired a dealer's ability to sell to other dealers in competition with distributors. In rejecting this claim, Judge Arnold observed:

> "Dealers like White who desire to compete in selling to *other dealers* will of course suffer a cost disadvantage compared with distributors, but to hold that the larger distributors' discount violates Section 2(a) in this circumstance would effectively abolish two-channel distribution systems in all industries. White cites no authority for this extraordinary interpretation of the Act, nor can we find any." 1988-1 Trade Cas. (CCH) at p. 58,086 (emphasis in original).

A rule requiring calibration of prices to wholesalers on the basis of each wholesaler's costs of wholesaling is also patently impracticable. These are costs which a supplier cannot be expected to know and which will vary from wholesaler to wholesaler and day to day.[18]

Nor, respectfully, was the court below correct in believing such a rule was required by this Court's decisions in *Morton Salt*,[19] *Perkins*[20] or *Falls City*[21]—none of which involved a claim that lower prices to wholesalers than retailers would violate the Act. Indeed, no case has so held and, in light of the Act's legislative history, it would be unreasonable to believe Congress intended any rule so destructive of wholesaling.[22]

II. The Fact That Wholesalers Have Been Charged Less than Retailers for a Long Time Does Not Warrant an Inference That Competition Thereby Has Been Lessened.

Liability was imposed below in the face of conceded evidence that competition was flourishing in the Spokane area. (See p. 5, *supra*). While the statute calls for proof that "the effect of such

18 As an independent business, each wholesaler makes its own decision about where to locate its facilities, what kinds of equipment to purchase and when to upgrade, what number and types of employees to hire and how best to compensate them, whether and how much to borrow, and where and when, what strategies to pursue to attract and retain customers, what amount of credit to extend to which customers, what time, effort and money to expend in helping its customers be successful, what products to handle, what size inventories to maintain of each, how frequently to make deliveries, and myriads of other matters—each of which can significantly impact cost.

19 FTC v. Morton Salt Co., 334 U.S. 37 (1978).

20 Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

21 Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).

22 As described in F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 11 (1962), "the prototype of the Robinson-Patman Act originated with the United States Wholesale Grocers Association, whose members felt the [retail] chain stores' competitive pinch." The Association's counsel, H. B. Teegarden, "throughout the hearings . . . functioned as Mr. Patman's factotum—drafting, analyzing, and explaining for the legislators." *Id.* at 12 n.38.

discrimination may be substantially to lessen competition," the court below effectively read this requirement out of the Act by misapplying the so-called *Morton Salt* inference (A-11 to A-12) and allowing injury to competition to be *inferred* where the only purported wrongdoing by the manufacturer was having a price to wholesalers that was lower than the price to retailers.[23]

In adopting what is essentially a *per se* rule of illegality,[24] the court below minimized the importance of injury to competition, disparaging this Court's teaching from *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977)—that the antitrust laws were enacted for "the protection of *competition*, not *competitors*"—as an old "chestnut." (A-10).

It is well settled, however, that the Robinson-Patman Act is "directed to the preservation of competition. The statute's concern with the individual competitor is but incidental." *American Oil Co.* v. *FTC*, 325 F.2d 101, 104 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964). *See also, e.g., Richard Short Oil Co.* v. *Texaco Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Motive*

23 Such a price difference, as the legislative history indicates, may not even be considered a "discrimination," much less proof of lessening competition. Thus, Congressman Utterback, a manager of a bill that resulted in the Robinson-Patman Act, explained:

> "A discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment. . . . If the two are competing in the resale of the goods concerned, that relationship exists. . . . But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill." 80 Cong. Rec. 9416 (1936).

24 The additional factor—that an independent wholesaler passed along a portion of the wholesaler discount to retail customers—is one the manufacturer cannot control and must assume can always happen when it sells to independent wholesalers.

Parts Warehouse v. *Facet Enterprises*, 774 F.2d 380, 394-95 (10th Cir. 1985).[25]

Moreover, as mentioned above, the court of appeals in *Boise Cascade* explained why the *Morton Salt* "self-evident" inference should not be mechanically applied, even in the context of the *retail* business of a "hybrid" wholesaler/retailer.[26] *A fortiori*, an adverse effect on competition may not be inferred where the purchasers are entirely on different levels of trade.

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25 As a leading commentator on the Act observed, a "focus on detrimental effects on competition, rather than a concern with individual competitors, is fundamental to a reconciliation of the Robinson-Patman Act with overall antitrust policies." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 130 (1962).

26 Judge Williams noted that there were pro-competitive advantages to continuing the wholesaler discount to a combined wholesaler/retailer, even where the "hybrid," as in *Boise Cascade*, acted overwhelmingly as a retailer:

> "A rule requiring suppliers to limit the discounts to items actually sold at wholesale would work to the detriment of Boise's purchasers, including dealers. Enforcement of such a rule would entail substantial administrative costs, *see* Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Ind. & Com. L. Rev. 543, 556 (1976) (a company that had insisted on certification of resale scrapped the requirement 'as unworkable because it was not adopted by its competitors, was resented by its customers, and resulted in falsehood and inaccuracy'), which would doubtless be passed on to customers. Because of these administrative costs, Commission insistence on such market segregation might well eliminate the use of functional discounts and the substantial efficiencies they generate for dealers. . . . The high administrative costs, as well as the tendency of the resulting efficiencies to spill over in sales to end users, likely account for sellers' disinclination to so restrict the discounts." 837 F.2d at 1152 n.7.

The dissent in *Boise Cascade* also makes clear that its concern was not with pure wholesalers receiving lower prices but where "a dual distributor chiefly functions in a retail capacity. . . ." 837 F.2d at 1162. Judge Mikva emphasized that in his view the case involved "competing retailers." *Id.* at 1152.

III. A Retailer May Not Predicate Competitive Injury and Treble Damages on the Basis of How Much Better Off He Would Have Been Had He Received a Wholesaler Discount.

Notwithstanding *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), the district court not only refused to charge that plaintiffs had to prove an actual impact upon competition to recover damages (ER 516), the jury was instructed that plaintiffs were *not* required to establish that the alleged discrimination in price actually injured competition (ER 542).[27] Instead, both for injury and damages, the focus was on whether and how much better off the plaintiff-retailers would have been had they received the wholesaler discount.

Such an approach, of course, is powerfully simple for a jury. It even strongly influenced the court of appeals, which referred to how much better off plaintiffs would have been "had they received as little as a two or three cents per gallon discount" (A-12) or "had they received a price break on their purchases of gasoline from Texaco" (A-14). However, while plaintiffs' desire for lower prices is relevant to a price-fixing case based on unlawful overcharges, it is not relevant to a Robinson-Patman case where the illegality is based on undercharging a favored purchaser. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981).

The violation here purportedly consisted of not reducing the uniform wholesalers' discount to correspond to a particular wholesaler's potentially lower operating costs. With that as the purported antitrust violation, the focus had to be on its consequences and on what the situation would have been had the favorable price to the wholesaler been appropriately *increased*. No legal basis exists for restoring through the back door what *Truett Payne* prohibited—"automatic damages"—by arguing

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27 This error alone is sufficient to warrant a new trial. *E.g.*, Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 577 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982); O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127 (1976).

and allowing a jury to conclude that a price *difference* may be eliminated not by increasing the wrongfully low price but by *reducing* someone else's, plaintiff's, price. The practical effect of the decision below is to vitiate *Truett Payne*.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of certiorari be granted.

Dated: June 14, 1988

Respectfully submitted,

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APPENDIX A

Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4225

D.C. No. *CV-76-27-JLQ*

RICKY HASBROUCK, D B A RICK'S TEXACO, et al.,

Plaintiffs-Appellees,

v.

TEXACO, INC. a Foreign Corporation,

Defendant-Appellant.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, *District Judge*, Presiding

Argued and Submitted
October 2, 1986—San Francisco, California

Filed October 26, 1987
Amended March 17, 1988

Before:

OTTO R. SKOPIL, JR., ARTHUR L. ALARCON AND STEPHEN REINHARDT, *Circuit Judges.*

Opinion by Judge Reinhardt

SUMMARY

Antitrust

Appeal from denial of j.n.o.v. and of denial of a new trial. The court affirmed holding that substantial evidence supports the jury findings regarding Texaco's liability and damage award. The court denied the appellant's petition for rehearing and rejected the suggestion for a rehearing en banc.

Appellee Hasbrouck and others were Texaco retail service station dealers purchasing gasoline directly from appellant Texaco and reselling it at retail. Texaco also supplied gasoline to Dompier Oil Company and Gull Oil Company at prices between 2.5¢ and 5.75¢ per gallon lower than the price Hasbrouck paid. Hasbrouck sued charging Texaco with illegal price discrimination alleging that Texaco sold gasoline at substantially and unjustifiably lower prices to Dompier and Gull resulting in a lessening of competition. The jury agreed and awarded Hasbrouck damages. The district court then granted Texaco's motion for j.n.o.v. On appeal, this court found that precedent should have been followed and remanded the proceeding for a new trial. The jury again returned a verdict for Hasbrouck and damages were trebled. The court denied Texaco's motions for j.n.o.v. or a new trial.

[1] The Robinson-Patman Act prohibits the sale of like goods to different purchasers at a different price, where the effect of such price discrimination may be substantially to lessen competition. [2] Manufacturers are permitted to use price differentials

(functional discounts) to compensate certain classes of buyers for the distributional services they perform. [3] That all wholesalers were offered the same discount would be an appropriate defense. Here, however, only the other customers are wholesalers; the appellees are retailers. [4] Appellees offered evidence that the services performed by Gull and Dompier were insubstantial and did not justify the functional discount. [5] Hasbrouck also presented evidence that the price discount received by Gull and Dompier was passed on to retail competitors of Hasbrouck. [6] Although selling at different prices to customers who are at different levels of distribution will not constitute a violation of the Act, [7] here, the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function. [8] Texaco claims that Hasbrouck failed to prove that the price discrimination resulted in injury to competition and instead presented evidence reflecting only injury to themselves as competitors. Injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. [9] The Act is violated upon showing that the effect of price discrimination may be substantially to lessen competition. Hasbrouck offered evidence showing that a substantial price discrimination existed and that harm to competition would be the likely result. [10] Appellees presented evidence showing that the injuries they suffered were precisely the type that would result from unlawful price discrimination and that they flowed from anti-competitive conduct thereby establishing antitrust injury under section 4 of the Clayton Act. [11] Despite Texaco's challenge, Hasbrouck has presented sufficient proof on the amount of damages. [12] In light of its broad discretion, the trial court did not abuse its discretion in formulating the jury instructions. [13] Finally, Texaco points to no extrajudicial basis for an alleged judicial bias. It offers no evidence that the trial judge acted less than in a wholly impartial manner.

COUNSEL

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ORDER

The panel has voted to deny the petition for hearing and to reject the suggestion for rehearing en banc. The full court has been advised that the following amended opinion would be filed. No judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The attached amended Opinion is ordered filed.

OPINION

Twelve service station owners successfully sued Texaco, Inc., for price discrimination under the federal antitrust laws. Texaco appeals the jury verdict and the district court's denial of its motion for judgment notwithstanding the verdict or, in the alternative, a new trial. We find that each of Texaco's arguments on appeal is without merit and, accordingly, affirm the decision of the district court.

I. *Background*

Ricky Hasbrouck and eleven other plaintiffs were Texaco retail service station dealers in the Spokane area; they purchased gasoline directly from Texaco and resold it at retail under the Texaco trademark.[1] Throughout the relevant time period Texaco also supplied gasoline to John Dompier Oil Company and Gull Oil Company at a price that was at various times between 2.5¢ and 5.75¢ per gallon lower than the price Hasbrouck paid. Dompier and Gull sold the gasoline they purchased from Texaco to independent retail service stations. Dompier sold the gasoline to retailers under the Texaco trademark; Gull marketed it under private brand names. Some of the retail stations supplied by Dompier and Gull were owned and operated by the suppliers' salaried employees.

Hasbrouck filed a complaint in 1976, charging Texaco with illegal price discrimination in violation of section 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1982),[2] and seeking treble damages under section 4 of that act, 15 U.S.C. § 15(a) (1982).[3] Section 2(a) is commonly referred to as the Robinson-Patman Act. The complaint alleged that Texaco sold gasoline at substantially and unjustifiably lower prices to Dompier and Gull, and that this resulted in a lessening of competition. When the matter was tried initially, the jury found that Texaco had engaged in price discrimination in violation of section 2(a) and awarded Hasbrouck $849,484 in damages under section 4. The district court, instead of trebling the damages, granted Texaco's motion for judgment notwithstanding the verdict (j.n.o.v.); the court held that jury instructions regarding the measurement of damages, which were based on *Fowler Manufacturing Co. v.*

1 For convenience, we will hereinafter refer in most instances to the twelve plaintiffs collectively as Hasbrouck.

2 Section 2(a), as amended by the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

The appropriate remedy upon proof of a section 2(a) violation is an injunction prohibiting the unlawful price discrimination.

3 Section 4 of the Clayton Act provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . . ."

Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), were erroneous because *Fowler* was either distinguishable, impliedly overruled or bad law. On appeal, we found that *Fowler* should have been followed at the time of trial and remanded the proceeding back to the district court for a new trial on the issues of liability and damages; we instructed it that the new trial should be conducted in conformity with the Supreme Court's recent analysis of price discrimination damages in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981). *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).

At the second trial, the jury again returned a verdict for Hasbrouck, this time in the amount of $449,900. This verdict was trebled by the court and judgment was entered in the amount of $1,349,700. Once again Texaco moved for a judgment n.o.v. or a new trial, but this time the district court denied the motion, finding that the jury's verdict was not contrary to the weight of the evidence and that Texaco failed to establish adequate grounds for a new trial. *Hasbrouck v. Texaco, Inc.*, 634 F. Supp. 34 (E.D. Wash. 1985). Texaco appeals.

II. *Discussion*

Texaco challenges several jury findings directly; it also bases its appeal from the district court's refusal to grant its motion for j.n.o.v. or a new trial on the alleged errors in those findings. An appellate court reviews a jury verdict only to determine whether it is supported by substantial evidence, that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1013 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 802 (1986). A refusal to grant j.n.o.v. is proper when the evidence does not compel only one possible conclusion, the one advocated by the losing party. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1642 (1986). A denial of a motion for a new trial is reviewed for abuse of discretion. *Robins v. Harum*, 773 F.2d 1004, 1006 (9th Cir. 1985).

A. *Proof of Price Discrimination Under Section 2(a)*

[1] Section 2(a) of the Clayton Act (the Robinson-Patman Act) prohibits the sale of like goods to different purchasers at a different price, where the effect of such price discrimination may be substantially to lessen competition, 15 U.S.C. § 13(a). Texaco challenges the jury's finding of liability under section 2(a) on two grounds, (1) that the admitted price differential was justified, and (2) that, in any event, the differential did not affect competition. We disagree with Texaco on both points. We address each in turn.

1. *Whether the Price Differential Was a Lawful Functional Discount.* Texaco argues that the price break afforded Dompier and Gull was a legitimate wholesale discount. It maintains that, because section 2(a) permits a manufacturer to offer wholesale discounts, the critical inquiry is merely whether the discount was equally available to all wholesalers.

[2] Manufacturers are permitted to use price differentials, commonly known as wholesale or functional discounts, to compensate certain classes of buyers for the distributional services they perform. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 43-44 (1948); 15 U.S.C. § 13(a); 3 E. Kintner & J. Bauer, *Federal Antitrust Law* §§ 20.14, 22.14 (1983). For this reason, goods may generally be sold to wholesalers at a lower price than that charged to retailers. However, the discount Texaco provided here does not qualify as a functional or wholesale discount. Moreover, Texaco is simply incorrect when it argues that it is absolved from Robinson-Patman liability if it can show that a particular discount was available to all wholesalers.

[3] That all wholesalers were offered the same discount would be an appropriate defense in a case where the plaintiff and the other customers of the defendant were all wholesalers performing at the same level in the chain of distribution. Here, however, only the other customers are wholesalers; the plaintiffs are retailers who are further down the chain of distribution. The inquiry occurs at the latter level and results from the receipt by wholesalers of a functional discount in excess of the

value of the services they perform, all or a portion of which they then pass on to the retailers they supply.

As the Supreme Court long ago made clear, and recently reaffirmed, there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers. *Morton Salt*, 334 U.S. at 43-44; *Perkins v. Standard Oil Co.*, 395 U.S. 642, 646-47 (1969); *Falls City Indus., Inc. v. Vanco Beverages, Inc.*, 460 U.S. 428, 434-35 (1983). Despite the fact that Dompier and Gull, at least in their capacities as wholesalers, did not compete directly with Hasbrouck, a section 2(a) violation may occur if (1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with Hasbrouck. *Morton Salt*, 334 U.S. at 43-44; *Perkins v. Standard Oil*, 395 U.S. at 648-49; *see* 3 E. Kintner & J. Bauer, *supra*, § 22.14.

[4] Hasbrouck presented ample evidence to demonstrate that both conditions were met. The plaintiffs offered evidence that the services performed by Gull and Dompier were insubstantial and did not justify the functional discount. For example, there was evidence that Gull had no bulk plant for temporary storage of gasoline and that its customers received direct deliveries from Texaco. This evidence supports the allegation that Gull's role as a middleman amounted only to engaging in paper transactions. The record also reflects that Texaco delivered gasoline directly to Dompier's customers in some instances. In addition, as the district court put it, Texaco made "no serious attempt" to provide a quantitative justification for its functional discount, instead "merely identifying some of the functions" that Dompier and Gull were said to have performed. 634 F. Supp. at 38.[4] In

4 Texaco does not argue that the services its wholesalers performed justified the amount of the discount and that, as wholesalers, Dompier and Gull were entitled to that discount whether or not they performed all of the customary wholesaler services. In any event, we express no view as to the merits of such an argument. We mention it only because of the emphasis that Texaco places on the claim that there was no evidence that Dompier and Gull were charged different prices than other wholesalers.

the face of Hasbrouck's evidence challenging the cost basis of the discount, Texaco's showing was clearly inadequate.

[5] Hasbrouck also presented sufficient evidence to support a finding that the 2.5¢ to 5.75¢ per gallon discount received by Gull and Dompier was passed on, at least in part, to retail competitors of Hasbrouck. There was documentary evidence that some retail stations operated or supplied by Dompier and Gull purchased gasoline at prices lower than those paid by Hasbrouck. There was also extensive testimony that, in order to stay in business, gasoline retailers needed a profit margin in the neighborhood of ten cents per gallon; yet, service stations operated or supplied by Dompier often sold gasoline at retail prices that were only two to three cents higher than the price that Hasbrouck paid to Texaco. This further tends to show that some portion of the discount was passed along. Because there was sufficient evidence that (1) the discount Texaco afforded Dompier and Gull was not justified by the services those companies performed, and (2) at least a portion of the discount was passed on to Hasbrouck's competitors, the jury could properly have concluded that there was an unlawful price differential.

[6] We recognize that, generally, selling at different prices to customers who are at different levels of distribution will not constitute a violation of the Robinson-Patman Act. *See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 120 (3d Cir. 1980); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976); 3 E. Kintner & J. Bauer, *supra*, § 12.12, at 289-99. However, if the position of the Federal Trade Commission is that charging lower prices to a wholesaler than to a retailer can never support a claim under the Act, *see Matter of Boise Cascade Corp.*, 50 Antitrust & Trade Reg. Rep. (BNA) 335, 336 (FTC Feb. 11, 1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988), we strongly disagree.

[7] Where, as here, the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function, the seller cannot claim immunity from Robinson-Patman liability. In such situations, the connection between the seller's price discrimination

and the adverse effect on competition is obvious and foreseeable, and a plaintiff may assert a cause of action against the seller even though he and the favored customer operate at different market levels. *See Perkins v. Standard Oil Company of California*, 395 U.S. 642 (1969); *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951). To hold that price discrimination between a wholesaler and a retailer could *never* violate the Robinson-Patman Act would leave immune from antitrust scrutiny a discriminatory pricing procedure that can effectively serve to harm competition. We think such a result would be contrary to the objectives of the Robinson-Patman Act.

[8] 2. *Whether the Price Differential Affected Competition*. Texaco also attacks the finding of section 2(a) liability by arguing that Hasbrouck failed to prove that the price discrimination resulted in injury to competition and instead presented evidence reflecting only injury to themselves as competitors. We disagree. The oft-quoted chestnut distinguishing between protecting competition and protecting competitors[5] has been misconstrued with some regularity by antitrust defendants who appear to argue in all types of antitrust cases that the effect of unlawful conduct on competitors is irrelevant. The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that harm competitors harm competition. However, the converse is *not* true. Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. The aphorism may not be invoked blindly in response to a showing that competitors have been harmed; otherwise it would often serve to shield unlawful conduct that adversely affects competition.

5 Evidently, the phrase that the antitrust laws were enacted for "the protection of *competition*, not *competitors*" originated in *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original).

[9] With respect to price discrimination claims, the significance of proof of harm to competitors is particularly clear. Section 2(a) of the Robinson-Patman Act is a prophylactic statute, designed to prevent the occurrence of price discrimination rather than to provide a remedy for its effects. The section is violated upon a showing that "the effect of such discrimination may be substantially to lessen competition." 15 U.S.C. § 13(a) (emphasis added); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). The Supreme Court has interpreted this portion of the statute as requiring an antitrust plaintiff to show only "a reasonable possibility that a price differential may harm competition." *Falls City Indus., Inc. v. Vanco Beverages, Inc.*, 460 U.S. 428, 434-35 (1983) (citing *Corn Prods. Refining Co. v. FTC*, 324 U.S. 726, 742 (1945)). For price discrimination antitrust claims, since *Morton Salt* it has been permissible to infer harm to competition from evidence of harm to competitors. *Morton Salt*, 334 U.S. at 50. The Supreme Court recently reaffirmed "*Morton Salt*'s 'self-evident' inference." *Falls City*, 460 U.S. at 436 (quoting *Morton Salt*, 334 U.S. at 46, 50-51).

> In *Morton Salt* this Court held that, for the purposes of § 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time. (citations omitted) In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.

Falls City, 460 U.S. at 435. Thus, in order for a plaintiff to prove competitive injury under Robinson-Patman, he need only show that a substantial price discrimination existed as between himself and his competitors over a period of time. In fact, Hasbrouck not only offered evidence demonstrating that a substantial price discrimination existed but also other evidence that harm to competition would be the likely result—as well as direct evidence of displaced sales.

It is undisputed that a price differential existed between the rate Texaco charged Hasbrouck and the rate it charged Dompier and Gull. Furthermore, there was evidence that the price

differential was substantial and that it was in effect for several years. There can be little doubt that Texaco's pricing policy constituted price discrimination that was unlawful unless it could be justified under the Act. However, as discussed above, there was sufficient evidence to permit the jury to find that the price differential did not represent a legitimate functional discount and that all or a portion of the discount received by Dompier and Gull was passed on to Hasbrouck's competitors. On appeal Texaco has not pursued any other possible justification for its pricing policy. Thus, there was sufficient evidence to permit the jury to conclude that competition may have been harmed, *i.e.*, that there was "a reasonable possibility"[6] that a competitive injury had occurred. See *Falls City*, 460 U.S. at 434-35.

There was in addition considerable specific evidence supporting the conclusion that Texaco's unwarranted pricing policies adversely affected competition. Several witnesses testified that the retail gasoline market was strongly price sensitive, and that a small price advantage reflected in lower retail prices would generate significant swings in customers and sales. Others testified that the plaintiffs lost customers and sales directly to Dompier and Gull stations, that the customer switches resulted from the differences in retail prices between the stations, and that the plaintiffs would have recovered these lost revenues had they received as little as a two or three cents per gallon discount and been able to reduce their pump prices commensurately. This evidence is probative of the fact that the unwarranted price advantages which some Gull- and Dompier-supplied retailers received had a deleterious effect upon the market.

B. *Proof of Antitrust Injury Under Section 4*

Texaco also challenges the jury's award of damages under section 4 of the Clayton Act. To recover damages under section 4, a plaintiff must show (1) a violation of the antitrust laws, (2)

6 The district court in fact instructed the jury that plaintiffs needed to "establish by a preponderance of the evidence that the effect of the discrimination in price . . . had the reasonable *probability* of substantially lessening competition, or of injuring or destroying or preventing competition." (emphasis added).

an actual injury of the type contemplated by the statute that is caused by the violation, and (3) the amount of damages suffered as a result. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-89 (1977). In this section, we address the second requirement.

Texaco contends that Hasbrouck failed to prove that it suffered an actual injury that the antitrust laws were designed to prevent. It also contends that there was no direct causal connection between any such injury and Texaco's unlawful conduct because of the existence of several intervening causes, *i.e.*, the independent pricing decisions by Dompier and Gull, their customers, and the plaintiffs.

Under section 2(a), all that is required to establish illegal price discrimination is proof that competitive injury *may* result. Once such a showing is made, the plaintiff is entitled to an injunction preventing defendant from engaging in the anticompetitive conduct. However, in order for a plaintiff to recover damages under section 4 he must make some showing of actual injury and causation. The Supreme Court has described these two requirements collectively as "antitrust injury."

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research[, Inc.]*, 395 U.S. [100,] 125 [(1969)].

Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. at 489 (emphasis in original); see *J. Truett Payne*, 451 U.S. at 562. Here, in order for Hasbrouck to prove actual injury, he must show that he lost sales and profits as a result of Texaco's anticompetitive conduct.

With respect to Texaco's assertion that intervening causes broke the chain of causality, we have recognized that *Bruns-*

wick requires a plaintiff to show "more than that it suffered injury causally linked to the antitrust violation; the injury must be shown to have 'flowed' from the wrong. . . . To be one of several causes is not enough. The injury must be of the type likely to be caused by the defendant's [antitrust violation]." *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); *see Brunswick*, 429 U.S. at 489. However, *Handgards* does not stand for the proposition that the violation must be the sole cause of the injury. "It is enough that the illegality is shown to be a material cause . . . a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." *Zenith Radio v. Hazeltine Research*, 395 U.S. at 114 n.9. In fact, in *Zenith Radio*, the Court permitted causality to be inferred from circumstantial evidence because the injury involved was "precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause." *Id.* at 125. *See Brunswick*, 429 U.S. at 487-89; *Handgards*, 601 F.2d at 997. While a defendant may introduce evidence of alternative causes of the injury, such evidence constitutes only a part of the information the jury may consider in determining whether price discrimination was or was not a material cause. "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury." *Perkins v. Standard Oil*, 395 U.S. at 648.

[10] Here, the plaintiffs presented substantial evidence to show that the injuries they suffered were precisely the type that would result from unlawful price discrimination and that they flowed from the anti-competitive conduct. Several of them testified as to diverted sales and lost profits; there was documentary evidence of increases in Dompier's sales volume over the same time period. Plaintiffs also testified that they would have recouped the lost revenues had they received a price break on their purchases of gasoline from Texaco. In addition, former customers testified that they had switched service stations because of the lower prices charged by stations supplied by Dompier or Gull.[7] We believe, as did the district court, that sufficient evidence was introduced to support the finding that Hasbrouck suffered an antitrust injury and that Texaco's unlawful price discrimination was a material cause of that injury.[8]

C. *Proof of Damages Under Section 4*

[11] Texaco also challenges the jury's damages award contending that Hasbrouck failed to present sufficient proof of the amount of damages. Texaco first argues that the district court improperly allowed the jury to consider the higher price charged Hasbrouck—the overcharge—in its calculation of damages, and that this was an improper measure of damages as a matter of law. Damages resulting from illegal price discrimination may not be measured merely by determining the overcharge to the disfavored buyer, *i.e.*, the excess paid by the disfavored buyer for the goods it purchased. *J. Truett Payne*, 451 U.S. at 557. In rejecting automatic damages in favor of proof of the actual damages incurred, the Court in *J. Truett Payne* stated that "damages could be awarded on the basis of plaintiff's estimate of sales it could have made absent the violation." *Id.* at 565 (citing *Zenith Radio*, 395 U.S. at 123-24 (dam-

7 Further evidence was submitted to show that Texaco management was fully aware of the existing pricing practices and the negative effect such practices were having on direct supplied retailers. This evidence strengthens the causal connection between Texaco's violations and the damage suffered by Hasbrouck. *See Perkins v. Standard Oil*, 395 U.S. at 649.

8 We note that, in any event, at least two of the three "intervening causes" referred to by Texaco—the facts that Dompier and Gull made independent pricing decisions, and that their customers did so—are inadequate as a matter of law. In essence, Texaco argues that a defendant may avoid Robinson-Patman liability simply by showing that the recipients of the unlawful discount, or their customers, independently set their resale prices. That view would preclude all Robinson-Patman claims involving secondary and tertiary line injury, since the antitrust laws do not permit sellers to dictate the resale prices charged by their customers. *E.g.*, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980). Texaco's argument is directly contradicted by a long line of Robinson-Patman cases that have found wholesalers liable for unlawful price discounts passed on to their customers. *E.g.*, *Morton Salt*, 334 U.S. at 37; *Perkins v. Standard Oil*, 395 U.S. at 642; *Falls City*, 460 U.S. at 428.

ages may be based on "evidence of the decline of prices, profits and values")).

There is no evidence that the jury based its damages award on an overcharge theory. In an attempt to estimate lost sales resulting from Texaco's pricing differentials, Hasbrouck's expert presented a market analysis that compared Hasbrouck's actual prices, volume and profits to its estimated amounts had the price discrimination not occurred. The expert arrived at the estimated figures using six economic projections based on different underlying assumptions, some of which assumed that Texaco eliminated the differential by raising its price to Dompier and Gull, while others assumed that Texaco lowered its price to Hasbrouck.

Texaco attempts to characterize these projections as representative of overcharge and undercharge theories, then argues that the jury was impermissibly shown evidence of an overcharge. This argument is not persuasive. None of the projections estimated Hasbrouck's damages by measuring the amount of the overcharge. The various projections simply permitted the jury to compare estimates of damages in different market situations, allowing them to determine what Hasbrouck's sales and profits would have been in the absence of price discrimination. Obviously, such a determination necessarily entails postulating the elimination of the price differential, either by increasing the favored buyer's price, decreasing the disfavored buyer's price, or a combination of the two. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, *reh'g denied*, 327 U.S. 817 (1946). In any case, as the trial judge stated in his opinion, any danger that the jury might use the overcharge theory to award automatic damages was offset by his contrary oral admonition and the jury instructions. Hence, the admission into evidence of Hasbrouck's damage projections does not provide grounds for reversal. *See United States v. Gwaltney*, 790 F.2d 1378, 1382 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1337 (1987).

Second, Texaco argues that Hasbrouck's damages theory was speculative and internally inconsistent. The burden of proving damages in an antitrust case is, as a matter of necessity, not "unduly rigorous," because "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation

would have been in the absence of the defendant's antitrust violation." *J. Truett Payne*, 451 U.S. at 565-66; *see Zenith Radio*, 395 U.S. at 123-24; *Bigelow*, 327 U.S. at 264. Accordingly, a plaintiff's burden of proving antitrust damages is "to some extent lightened" once a violation is established, and the jury is allowed to approximate the amount of damages. *J. Truett Payne*, 451 U.S. at 567-68.

In this case, Hasbrouck submitted a market analysis which estimated lost profits six different ways. Such evidence is clearly comparable to that accepted by the Court in *Bigelow*, where the plaintiffs estimated damages by comparing their actual profits to their profits immediately before the violation, and to the profits of a competitor who was not subject to the violation. *See Bigelow*, 327 U.S. at 257-59. *Cf. Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 582 (5th Cir. 1982), *cert. denied*, 459 U.S. 908 (1982) (on remand from Supreme Court, damage award held insupportable because plaintiff failed to offer any evidence that its retail prices differed from those of its competitors, who allegedly received an unjustified discount). Hasbrouck's evidence was sufficient to support the jury's damage award.

Finally, Texaco claims the jury's damages award was excessive because it exceeded the total presented in the Hasbrouck's expert's analysis. We will not disturb an award of damages unless it is clearly unsupported by the evidence. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985). An otherwise supportable damage verdict will be affirmed unless it is "grossly excessive" or "shocking to the conscience." *Id.* The award here was substantially equivalent to the amount of damages estimated in Hasbrouck's market analysis and does not appear to be grossly excessive. We, therefore, reject Texaco's argument.

D. *Adequacy of the Jury Instructions*

[12] Texaco claims the jury instructions evidence reversible error on the part of the district court. The trial court has broad discretion in formulating jury instructions and will be reversed only upon a showing of an abuse of discretion. *United States v.*

Wellington, 754 F.2d 1457, 1463 (9th Cir.), *cert. denied*, 106 S. Ct. 593 (1985). So long as the instructions on each element of the case are adequate to ensure that the jury fully understands the issues, no particular formulation or wording is necessary. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1398 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). A defendant is entitled to an instruction on a defense theory if it has a basis in the law and in the record. *United States v. Coin*, 753 F.2d 1510, 1511 (9th Cir. 1985). The failure to submit a proper jury instruction is a question of law reviewed *de novo*, *999 v. C.I.T. Corp.*, 776 F.2d 866, 871 (9th Cir. 1985), but subject to the harmless error rule. See *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1337 (9th Cir. 1985).

First, Texaco argues that the jury should have been expressly instructed that actual injury is a prerequisite to recovery of treble antitrust damages. The district court did just that when it instructed the jury that Hasbrouck had the burden of proving by the preponderance of the evidence that he "was injured in his property or business by reason of [price] discrimination."

Second, Texaco asserts that the court failed specifically to instruct the jury that the injury proven must be to competition, and not merely to competitors. In its persistent obfuscation of the competition-competitor point, Texaco blurs the fact that proof of potential injury to competition under section 2(a) must be distinguished from a plaintiff's additional burden of proving actual injury and damages under section 4. Injury to the specific plaintiff is the sine qua non of a section 4 claim, once injury to competition has been established. The challenged instructions correctly addressed this point. Separate instructions properly set forth the plaintiffs' obligations as to both sections 2(a) and 4. There is no need to include a specific instruction differentiating between competition and competitors. Viewed as a whole, the district court's instructions were more than adequate to ensure that the jury understood the issues. *See Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1398.

Texaco next contends that the trial judge erred by not expressly instructing the jury as to the distinction between an undercharge and an overcharge theory of discrimination. However, the trial court instructed the jury that it was not permissible to determine the amount of Hasbrouck's damages "merely by determining the price difference between the favored and disfavored buyers and multiplying that figure by the number of gallons involved." This instruction correctly described and rejected the overcharge theory. The fact that the trial judge did not use the exact words requested by Texaco does not support a finding of abuse of discretion. *See Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1398.

Finally, Texaco alleges that it was improper for the district court to instruct the jury that each of several factors may be a proximate cause of an injury, and that the court refused a requested instruction on intervening causes. These allegations essentially repeat Texaco's claim that Hasbrouck failed to prove proximate cause because of the remoteness of the injury from the price discrimination. As discussed earlier, an antitrust plaintiff need only show that the violation is a material cause of his injury, not that it is the only cause. *Zenith Radio*, 395 U.S. at 114 n.9, 125; *see Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). The trial judge correctly stated the law in his proximate cause instruction which specified that the violation must "play a substantial part" in causing the injury. *See Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292, 304 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978). Further, while jury instructions did not mention the phrase "intervening causes," they did specify that the injuries had to be "a direct result or a reasonably probable consequence" of the violation, or put another way, that the damages suffered must be "by reason of the violations of the antitrust laws." *See Handgards*, 601 F.2d at 997. Taken as a whole, the instructions made it clear that damages must "flow" from the violation. Therefore, the district court did not err in refusing the requested instruction.

C. *Texaco's Allegation of Judicial Bias*

[13] Texaco requests a new trial because of an alleged judicial bias in favor of Hasbrouck. A judge is required to disqualify himself if his impartiality might reasonably be questioned,

or if he has a personal bias or prejudice for or against a party. 28 U.S.C. §§ 455(a), 455(b)(1).[9] The bias must stem from an extrajudicial source and not be based solely on information gained in the course of the proceedings. *In re Beverly Hills Bancorp*, 752 F.2d 1334, 1341 (9th Cir. 1984). However, Texaco points to no extrajudicial basis for the alleged bias and in fact offers no evidence that the trial judge acted in less than a wholly impartial manner. Texaco supports its allegations of bias merely by pointing to alleged errors at trial in refusing a request to disqualify jurors, formulating preliminary and final jury instructions, and overruling defense objections. Even if these ruling were erroneous, and we do not suggest that they were, they could not justify a finding of judicial bias. Texaco's claim of judicial bias is wholly without merit.

III. *Conclusion*

Substantial evidence supports the jury findings regarding Texaco's liability and the award of damages. Furthermore, we find the district court's jury instructions sufficient to ensure that the jury fully understood the issues. Because the evidence permitted the jury reasonably to conclude that Hasbrouck was entitled to a favorable verdict, the district court properly denied Texaco's motion for j.n.o.v. We further find no abuse of discretion in the district court's denial of Texaco's motion for a new trial.

AFFIRMED.

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9 Recusal is also required for personal bias or prejudice under 28 U.S.C. § 144. This section, however, requires the timely filing of an affidavit alleging such bias. Because no affidavit was filed by Texaco, section 144 is not applicable.

Although it is unsettled what timeliness requirements apply to section 455, it is clear that a party must have a legitimate excuse, such as newly discovered evidence, for failure to raise the issue at the trial level. *United States v. Conforte*, 624 F.2d 869, 879-80 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980). In this instance, we assume *arguendo* that Texaco's assertion of judicial bias in its motion for j.n.o.v. was sufficient to preserve the issue for appellate review.

APPENDIX B

Opinion and Order of the United States District Court for the Eastern District of Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-76-027-JLQ

RICKY HASBROUCK, d/b/a RICK'S TEXACO, et al.,

Plaintiffs

vs.

TEXACO, INC., a foreign corporation,

Defendant

MEMORANDUM OPINION AND ORDER DENYING MOTION FOR JNOV OR NEW TRIAL

AS SCHEDULED, this matter came on for oral argument in Spokane, Washington on August 14, 1985. Plaintiffs were represented by Robert Whaley and Lucinda Whaley. William Fremming Nielsen, Randall Robinson, Mark Litvack and Ira Sacks appeared on behalf of the defendant.

Upon consideration of the record and the oral presentations of counsel, the court rules as follows: defendant's motion for judgment notwithstanding the verdict or a new trial (Ct. Rec. 739) is DENIED.

DISCUSSION

A. *Judgment Notwithstanding The Verdict:*

Pursuant to Fed. R. Civ. P. 50(b), Texaco asks this court to set aside the verdict and enter judgment in accordance with its

motion for directed verdict.[1] Such a motion may be granted only if the jury's verdict is not supported by substantial evidence. *Los Angeles Memorial Coliseum Com'n v. National Football League*, 726 F.2d 1381, 1392 (9th Cir. 1984). Stated another way, a judgment notwithstanding the verdict is appropriate when the evidence permits only one reasonable conclusion as to a verdict and the jury's verdict is inconsistent with that conclusion. *See Walker v. KFC Corp.*, 728 F.2d 1215, 1223 (9th Cir. 1984). In making that analysis, this court is prohibited from considering witness credibility or weighing the evidence but must view the evidence in the light most favorable to the plaintiffs. *Los Angeles Memorial Coliseum Com'n v. National Football League*, 726 F.2d at 1392. Applying those principles to each of the four grounds asserted in defendant's motion, the court concludes the verdict must stand.

1. *Price differentials as "functional discounts":*

A "functional discount" is a traditional technique used in business pricing practices. Sawyer, *Business Aspects of Pricing Under the Robinson-Patman Act* (1963). A functional discount occurs where a buyer is permitted to purchase a product for a lower price than another buyer because of the different levels of distribution occupied by the buyers or because the buyers perform different functions in the seller's marketing system.[2] The

1 The reasons set forth in this opinion for denying Texaco's JNOV motion are also intended to supplement the court's oral ruling denying defendant's motion for a directed verdict.

2 Some economists and commentators have distinguished between the terms "functional discount" and "trade discount." *See Boise Cascade Corp.*, Docket No. 9133, slip op. at 99-100 (Feb. 14, 1984) (initial decision); Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. & Comm. L. Rev. 543, 545 n.9 (1976). Technically, a "functional discount" disregards the buyer's level in the distribution scheme and rewards the buyer for actually performing functions which otherwise would be performed by the seller. A "trade discount", on the other hand, is given to a buyer based upon the buyer's level in the distribution scheme and is completely independent of the functions performed by the buyer. Thus, a "trade discount" should be available to all buyers who operate at the same trade level regardless of the actual functions performed and a "functional discount" should be available to any buyer—regardless of its trade level—who performs functions for the seller. Although defendant Texaco has not made this distinction, and it is questionable whether the distinction is of any legal importance, *see* Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L.J. 929, 936 (1985), the thrust of defendant's argument appears to fall within the parameters of functional discount in its more limited, technical sense, *i.e.*, that Dompier and Gull were performing functions which Texaco would otherwise have performed.

primary justification for the discount is to compensate the buyer for its cost of performing functions ordinarily performed by the seller.[3] Generally, functional discounts do not trigger Robinson-Patman Act liability either because the buyer who receives the discount and the buyer who does not are on different trade levels (and therefore are not competitors) or because the discount merely offsets the competing buyer's additional costs incurred in performing the seller's functions. In other words, if the buyers do not function at the same level the requisite "competitive injury" is unlikely. Similarly, if the discount merely offsets the buyer's additional costs, it is unlikely the buyer's condition would be enhanced enough to cause an injury to competition. Thus, the critical question in determining the legality of a functional discount is whether the price differential has an adverse effect on competition; if it does, and conventional defenses are absent, the discount violates the Act. 3 Kintner, *Federal Antitrust Law* 308 (1983) ("underlying inquiry . . . : is there injury to competition?"); Antitrust Section, Monograph No. 4, *The Robinson-Patman Act: Policy and Law, Volume I* 54 (1980) (legality of functional discounts "depends upon the absence of adverse competitive effects"); Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. &

3 The functional discount concept is distinguished from the cost justification defense, 15 U.S.C. § 13(a), in that the former focuses on the buyer's cost of performing the seller's functions and the latter is concerned with comparing the seller's costs of servicing one buyer versus the cost of servicing another buyer. Understandably, many commentators, including a chairman of the A.B.A.'s Robinson-Patman Act Committee of the Section of Antitrust Law, find it a "confusing distinction." Panel Discussion—Questions and Answers, 53 Antitrust L.J. 967, 968 (1985) (comment by Bernat Rosner).

Comm. L. Rev. 543, 546 (1976) (legitimacy of functional discounts "depends on the absence of an anti-competitive effect"); *Mueller Company*, 60 F.T.C. 120, 129 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *quoting General Foods Corporation*, 52 F.T.C. 798 (1956) (the Robinson-Patman Act permits "lower prices to one functional class as against another, provided that injury to commerce as contemplated by the law does not result . . ."); *Doubleday and Company, Inc.*, 52 F.T.C. 169, 207 (1955) ("traditional [functional] discounts . . . remained lawful under the Robinson-Patman Act unless engendering adverse effects on competition . . ."); *cf. FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1027 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1097, 97 S. Ct. 1116, 51 L. Ed. 2d 545 (1977) ("[w]e do not suggest or imply that . . . a price discount to . . . wholesalers . . . which has the purpose or effect of defeating the objectives of the Act" is beyond the scope of the Act).

Even without viewing the evidence in the light most favorable to the plaintiffs, the preponderance of the evidence produced in this case demonstrated that Texaco's functional discounts adversely affected competition. That result was brought about primarily by two reasons. First, since Texaco engaged in dual distribution, *i.e.*, sold to both retailers and distributors, the plaintiffs and the favored buyers were not always in competition.[4] That absence of competition, however, does not negate competitive injury, where, as here, the disfavored buyer competes with the favored buyer's customers. As the Supreme

4 Prior to 1974 Dompier Oil Co. did not operate any retail stations but, as a distributor, sold Texaco gasoline to retail stations. Beginning in 1974 Dompier did acquire retail outlets and eventually operated four Texaco retail stations. While there is a serious question as to whether Dompier was entitled to a "functional discount" on the gas it *resold at retail, compare Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923, 84 S. Ct. 1219, 12 L. Ed. 2d 215 (1964) (entitlement to functional discount based on resale level) *with Doubleday and Co.*, 52 F.T.C. 169 (1955) (entitlement to functional discount based on level of purchase), the court assumes, *arguendo*, that the mere fact that Dompier retailed the gas does not preclude a "functional discount." *See Boise Cascade Corp.*, Docket No. 9133 (Feb. 14, 1984) (initial decision) (Administrative Law Judge urges adherence to *Mueller* rule).

Court recently confirmed, a Robinson-Patman Act violation may occur even though the favored and disfavored buyers are not competitors. *Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983) (competition was between *customers* of favored buyers and *customers* of disfavored buyers). The record in this case contains substantial evidence that the favored purchasers' (or their customers') lower retail prices attracted customers away from the plaintiffs and that the lower prices were the major reason for the diverted sales. Such evidence more than establishes injury to competition. *Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. at 437-38, *citing J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-62 (1981).

Secondly, the functional discounts negatively affected competition because they were, in part, reflected in the favored purchasers' (or their customers') retail prices. In other words, the discount was not consumed or absorbed at the level of the favored buyers; rather, the amount of the discount (or a significant portion) appeared in the favored purchasers' retail price, or in the favored purchasers' price to their customers and in their customers' retail prices. Under such circumstances, the otherwise innocuous nature and presumed legality of functional discounts is rebutted, for it is universally recognized that a functional discount remains legal only to the extent it acts as compensation for the functions performed by the favored buyer. *See* 3 Kintner, *Federal Antitrust Law* 309-10 (1983); Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L.J. 929, 939-41 (1985). The discount must "be reasonably related to the expenses assumed by the [favored] buyer" and the discount "should not exceed the cost of . . . the function [the favored buyer] actually performs . . ." *Doubleday and Company*, 52 F.T.C. at 209, *cited* in *Boise Cascade Corp.*, Docket No. 9133, slip op. at 117 (Feb. 14, 1984) (initial decision). If the discount exceeds such costs, it cannot be justified as a functional discount, particularly where, as here, the excess has a negative effect on competition.

In this case Texaco made no serious attempt to quantitatively justify its functional discounts. While a precise accounting of the value of the performed functions is not mandated, merely

identifying some of the functions is not sufficient.[5] There is no substantial evidence to support Texaco's position that the discounts were justified. In fact, the preponderance of the evidence points to the contrary: had the amount of the discounts been merely reimbursement for the value of the services performed by the favored buyers, it is improbable that the discounts (or a portion) could have been passed along and been reflected in the retail price. Consequently, the price differential and its resultant impact on competition cannot be legitimized under the rubric of functional discount.

2. *Competitive Injury:*

To prove a violation of the Robinson-Patman Act, a plaintiff must, *inter alia*, establish that the effect of the price differential "*may be* substantially to lessen competition." Section 2(a). The Act "does 'not require that the discriminations must in fact have harmed competition.' " *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 562, *quoting Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742, 65 S. Ct. 961, 969, 89 L. Ed. 1320 (1945). Rather, a plaintiff must only show "a reasonable possibility that a price difference may harm competition." *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. at 434-35. That "reasonable possibility of harm is often referred to as *competitive injury*." *Id.* (emphasis added).

As stated earlier, it is not necessary that there be injury to competition between the favored and disfavored buyer; the Act also encompasses the injury to competition between the disfavored buyer and the favored buyer's customers. *See Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. at 436. Accordingly, as there was substantial evidence that the plaintiffs competed with Dompier-supplied retail stations,[6] and the Gull

5 Although Texaco did introduce evidence that Dompier and to some extent Gull were performing marketing and advisory functions, the gasoline hauling function cannot be considered, at least to the extent it was compensated for by the hauling allowance, since the court excluded the hauling allowance from the price differential.

6 The term "Dompier-supplied retail stations" includes any stations supplied by Dompier, including Dompier's own retail outlets.

stations, the requisite injury could occur in the competition between plaintiffs and those stations.

In a highly competitive market like retail gasoline where customers are influenced by small price differences, substantial price discrimination over a significant period of time raises an inference of competitive injury. *See FTC v. Morton Salt Co.*, 334 U.S. at 46, 50-51. Absent direct evidence of displaced sales, however, "this inference may be overcome by evidence breaking the causal connection between the price differential and lost sales or profits." *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. at 435. But, where the record reveals that the price discrimination as between the favored and nonfavored buyer affects prices to the extent of diverting sales, the plaintiff has "more than established the competitive injury required for a prima facie case under § 2(a)." *Id.* at 437-38. The record presented in this case contains substantial evidence that the price discrimination was substantial, that it existed over a significant period of time and that it resulted in the diversion of sales from the plaintiffs to the Dompier-supplied retail stations. The plaintiffs proved diverted sales and the defendant did not produce substantial evidence breaking the causal connection between the diverted sales and the price differential. Therefore, the competitive injury element was established.

3. *Antitrust Injury:*

In addition to proving a prima facie violation of the Act, a plaintiff seeking treble damages "must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 562. In other words, the plaintiff must show that he was in fact injured, that the injury is of the type the Act was intended to prevent, and that the injury is causally connected with the violation of the Act. *See California Computer Products v. International Business Machines*, 613 F.2d 727, 732 (9th Cir. 1979). Such an injury is referred to as "antitrust injury." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

The plaintiffs' burden of proving the fact of injury is satisfied by proof of some damage flowing from the unlawful price discrimination. *See Zenith Corp. v. Hazeltine*, 395 U.S. 100, 114 n.9 (1969); *California Computer Products v. International Business Machines*, 613 F.2d at 732. Although it is not enough that the price discrimination was merely one of several causes, *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979), the plaintiff "need not exhaust all possible alternative sources of injury"; it is enough that the violation of the Act "is shown to be a *material cause* of the injury." *Zenith Corp. v. Hazeltine*, 395 U.S. at 114 n.9 (emphasis added); *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 903 (3d Cir. 1985). The plaintiff must prove "with a fair degree of certainty that the defendant's illegal conduct *materially contributed* to his injury." *Affiliated Capital Corporation v. City of Houston*, 735 F.2d 1555, 1564 (5th Cir. 1984) (emphasis added). The plaintiffs here produced a substantial quantum of evidence that they suffered lost sales and profits as a result of their competitors' lower retail prices which were occasioned by the unlawful price discrimination. That proof was more than enough to establish the connection between their injury and the defendant's violation of the Act.

There can be little question that the plaintiffs' injuries are of the type "the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 562. As is often repeated: "[t]he antitrust laws . . . were enacted for 'the protection of *competition* not *competitors*.' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 488, *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Thus, "the primary purpose of the [Robinson-Patman] Act is to protect the competitive process, not individual competitors." *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676, 680 (10th Cir. 1984). The injuries suffered by these plaintiffs were their lost sales and profits brought about by their inability to compete with the favored purchasers' customers, the very "injury the Robinson-Patman Act was intended to prevent." *World of Sleep, Inc. v. La-Z-Boy*, 756 F.2d 1467, 1480 (10th Cir. 1985). Clearly, as here, when twelve independent businesses operating in the same general market are unable to compete due to price discrimination, the competitive process, *i.e.*, competition, has indeed been injured.

4. *Meeting Competition:*

To overcome its burden to establish the "meeting competition" defense, Texaco was required:

> . . . at least to show the existence of facts that would lead a reasonable person to believe that the seller's lower price would meet the equally low price of a competitor; it also requires the seller to demonstrate that its lower price was a good faith response to a competitor's lower price.

Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. at 451. Obviously, that standard is a factual one and whether it is met depends " 'on the facts and circumstances of the particular case, not abstract theories or remote conjectures.' " *United States v. United States Gypsum Co.*, 438 U.S. 422, 454 (1978), *quoting Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963). Although Texaco did present some evidence in support of its meeting competition defense, that evidence was controverted.[7] Apparently, the jury concluded Texaco did not overcome its burden, and this court is unable to conclude that the meeting competition evidence demanded a contrary result or that the jury's verdict is unsupported by substantial evidence.

B. *New Trial:*

This court is empowered to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). Reasons warranting a new trial are if the jury's verdict was "clearly contrary to the weight of the evidence," *William Inglis v. ITT Continental Baking Co.*, 609 F.2d 1014, 1027 (9th Cir. 1981), "fundamentally unfair," *Alma v. Manufacturers*

7 Although Texaco did put forth some evidence that its pricing practices in the early 1970's (particularly as regards Gull) were motivated by competition, scant evidence was produced that the "competitive circumstances" justified a continuation of the lower price in subsequent years. *See Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. at 450.

Hanover Trust Co., 684 F.2d 622, 625 (9th Cir. 1982), or was a "miscarriage of justice." *Peacock v. Board of Regents*, 597 F.2d 163, 165 (9th Cir. 1979). In making the determination as to whether any such reason exists, the court must exercise its "sound discretion." *Philippine National Oil Co. v. Garret Corp.*, 724 F.2d 803, 805 (9th Cir. 1984). In so doing, the court "may properly consider the credibility of the witnesses and the weight of the evidence." *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978). Applying those principles to the new trial grounds asserted by Texaco, the court concludes a new trial is not warranted.

1. *Damages:*

It is now settled that a plaintiff seeking damages for violation of the Act may not simply look to the amount of discrimination as the measurement of those damages. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S. Ct. 1923, 75 L. Ed. 2d 174 (1981). The compensable harm is the economic harm suffered as the result of the discrimination and the amount of the discrimination, without more, "does not indicate the amount of lost sales or profits." *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 582 (5th Cir. 1982). But, once a plaintiff has proven an "antitrust injury," a lesser burden is faced in quantifying the damages. *See J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. at 565-67; *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435 (5th Cir. 1985) ("Under this relaxed burden, a jury verdict may stand on less evidence than is normally required to support a damage award in civil cases"); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1525 (10th Cir. 1984) (relaxed standard is justified because "an antitrust plaintiff is rarely able to prove its damages with mathematical precision"); ABA Antitrust Section, *Antitrust Law Developments* 409 (1984) ("the burden of proving the amount of damages is less than that required for proving the fact of damage"). Nevertheless, the plaintiff must put forth substantial evidence from which the trier of fact can determine the amount of damages from "a just and reasonable estimate of the damage based upon relevant data." *Bigelow v.*

RKO Radio Pictures, 327 U.S. 251, 264 (1946). That estimate, however, may not be the result of "speculation or conjecture." *Id.*

Texaco argues that much of plaintiff's damage evidence is irrelevant. Specifically, the defendant asserts that any damage estimate based upon a hypothetical lower price to plaintiffs is improper. The basis for Texaco's contention is that a damage estimate based on lowering plaintiffs' purchase price assumes that the price was unlawfully high, *i.e.*, that plaintiffs were "overcharged." According to Texaco, the Robinson-Patman Act is not concerned with whether the plaintiffs paid too much for their gasoline but whether their competitors paid too little. Put another way, the defendant categorizes the Act as proscribing "undercharges" not "overcharges."

In the context of Robinson-Patman Act cases, the undercharge-overcharge theory apparently had its genesis in *Enterprise Industries v. Texas Company*, 240 F.2d 457 (2d Cir. 1957), *cert. denied*, 353 U.S. 965, 77 S. Ct. 1049, 1 L. Ed. 2d 914 (1957). In *Enterprise*, Judge Learned Hand rejected the notion that a Robinson-Patman Act violation would automatically lead to damages in the amount of the price discrimination. *Id.* at 458-60. Since "the wrong was in selling gasoline to the nine Texaco competitors at a *lower price* than to the plaintiff," *id.* at 458 (emphasis added), Judge Hand concluded that the question of damages (the existence and amount thereof) must focus on the consequences of the *lower price*, not merely the price differential.

Although the Ninth Circuit rejected Judge Hand's approach, *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 90 S. Ct. 571, 24 L. Ed. 2d 503 (1970), at least one distinguished commentator wholeheartedly endorsed it and advocated its universal acceptance. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Antitrust Review*, 71 Colum. L. Rev. 1, 31-35 (1971) (hereinafter cited as Handler, *Twenty-Third Review*). As then-Professor Handler put it:

> Those who adopt an automatic damages rule view the plaintiff's injury as in the nature of an overcharge. Ac-

cording to them, he has paid more than he should lawfully have paid and, accordingly, should recover as damages the amount of the unlawful exaction. After all, one who is victimized by a price-fixing conspiracy may recover the full amount of the overcharge without regard to any possible recoupment (or pass-on) by raising his resale prices. Why should the victim of a discriminatory overcharge fare worse?

> The answer is that the Robinson-Patman plaintiff, unlike the purchaser of price-fixed goods, has not been overcharged at all. Had there been no violation of law, he would not necessarily have paid a lower price. The seller would have been free of any and all liability if he had charged others the same high price obtained from the plaintiff. In sum, the plaintiff is not entitled to a lower price, but only to parity with his competitor. That being so, his damages are not to be measured as though he were overcharged. Rather, to demonstrate that he was injured by the price differential, he must show damages flowing from the undercharge to his competitor.

Id. at 32.

Following the Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (private plaintiff must demonstrate "antitrust injury"), Milton Handler again attacked the Robinson-Patman Act automatic damages concept:

> *Brunswick* thus served to reaffirm *Enterprise*'s basic teaching: that cognizable injury to a section 2(a) case is to be traced not to the higher price paid by the plaintiff (the overcharge)—since the infraction is a price *difference* and all the law requires of the seller is a parity in pricing—but rather to the *undercharge* to plaintiff's competitor. Justice Cardozo, with characteristic felicity, put it this way in a different, but related, context: "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less." Put in *Brunswick*'s terms, the fact that the disfavored purchaser pays more for the same product than the favored purchaser, while constituting a form of economic injury or harm to plaintiff's pocketbook, does not amount to "antitrust injury" or provide a proper measure of antitrust damages. On the other hand, "antitrust injury" is sustained where it can be shown that the favored competitor, by virtue of his lower cost, lowered his resale price so that the plaintiff either lost sales volume (if he did not meet this competition) or lost profits (if he did match the lower resale price). It is the harm from the discrimination, that is, the undercharge and not from the overcharge which constitutes antitrust injury in the *Brunswick* sense.

Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term--1977*, 77 Colum. L. Rev. 979, 993 (1977). As we all now know, Handler's insight proved to be in tune with the Court's thinking as evidenced by *Truett Payne*'s rejection of the automatic damage rule.

When the *Truett Payne* Court struck down the concept of automatic damages, in effect it did two things. First, it established that a disfavored buyer must prove it suffered an antitrust injury beyond merely having paid more for a product than the favored buyer; in other words, it may not look to the price differential as constituting the antitrust injury. Second, once the antitrust injury has been proven, it may not simply be measured by the amount of the price differential. The plaintiffs here have not violated either of those prohibitions. Here, the plaintiffs did not rely on the price differential to establish their antitrust injuries: their injuries were proven via evidence of diverted sales and lost profits causally connected to their competitors' *lower prices, i.e.*, from the "undercharge." *See* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term*—1977, 77 Colum. L. Rev. at 993. Moreover, the plaintiffs did not merely look to the amount of the price differential to quantify their damages; rather, they presented "just and reasonable" estimates of their lost sales and profits. *See Bigelow v. RKO Radio Pictures*, 327 U.S. at 264.

The rejection of the automatic damage concept must be distinguished from the way in which plaintiffs used their higher purchase price to estimate their damages. When a disfavored buyer sues for damages for a violation of the Act, "he should as a matter of standard remedial principles, be entitled to be placed in the same position he would have been in had there been no violation." Handler, *Twenty-Third Review* at 32. But, as the Court recognized in *Truett Payne*, "[t]he vagaries of the market place usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation." 451 U.S. at 566, 101 S. Ct. at 1929. In an attempt to present a picture as to what their sales and profits would have been "had there been no violation," the plaintiffs offered six different hypothetical scenarios in which there was no price discrimination. In four of those hypothetical models, the price differential between the plaintiffs and the favored purchasers was eliminated (either totally or partially) by reducing the plaintiffs' purchase price. By including a reduction-in-price-to-plaintiffs component in their model the plaintiffs are not contending that they were "overcharged"; rather, they have, in effect, postulated how Texaco would have responded had it been ordered to eliminate the price differential. Then the damage estimates for each model represent the difference between the plaintiffs' actual sales and profits and what their sales and profits would have been had Texaco responded as postulated in the model. It is a distortion and misapplication of the "overcharge-undercharge" concept for the defendant to argue that the only legally permissible model from which to estimate damages is one in which the favored buyer's price is increased.[8]

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8 The fallacy of defendant's off-target argument is highlighted in the following hypothetical: Jake's Texaco and Jenny's Texaco are competing Texaco gasoline retailers in Free Marketville, U.S.A. They both are supplied by Texaco's tanker truck and their product-purchase price is identical and provides Texaco with a better than average profit margin. Being the only Texaco retailers in the market they have prospered and so has Texaco. Now, along come two new Texaco retailers into the market, Tom's Texaco and Terry's Texaco. They receive their gasoline in the same manner as Jake and Jenny, only Tom and Terry pay four cents per gallon more for their gas. Assuming that Tom and Terry eventually close their doors because they cannot

The plaintiffs' damage estimates are not based upon "speculation or conjecture." *See Bigelow v. RKO Radio Pictures*, 327 U.S. at 264, 66 S. Ct. at 579. At the core of plaintiffs' expert Dr. Leffler's damage calculations are his conclusions as to the correlations between the at-issue price differentials and plaintiffs' gasoline sales. To establish that correlation Dr. Leffler analyzed 1975-1978 price and sales data from some of the plaintiffs' stations and Dompier stations. From that data Dr. Leffler discovered a relationship between plaintiffs' gasoline sales and plaintiffs' retail prices vis-a-vis Dompier's retail prices. That relationship became the basis of Dr. Leffler's damage computations throughout the entire 1972-1981 period. Although defendant's expert Dr. Barron attacked Dr. Leffler's methods and assumptions, this court is unable to conclude that Dr. Leffler's analysis is improper as a matter of law or that it is too conjectural. Furthermore, the jury apparently accepted a significant portion of Dr. Leffler's analysis, and this court concludes their verdicts were not contrary to the weight of the evidence. None of the verdicts was excessive and each "could reasonably have been reached," and, therefore, should be accepted. *Raynor Brothers v. Cyanamid Co.*, 695 F.2d 382, 385 (9th Cir. 1982).

2. *Admission of Exhibit 912:*

An evidentiary ruling is grounds for a new trial only if refusal to grant a new trial would be "inconsistent with substantial justice." Fed. R. Civ. P. 61. Texaco argues that the court erred in admitting Exhibit 912 because it represents automatic damages in the amount of the price discrimination. While the relevance or probative value of such evidence is unclear since the Court's decision in *J. Truett Payne*, the danger of its admission, *i.e.*

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compete, that they are able to prove a violation of the Act, that Texaco has no statutory defenses and that the plaintiffs prove "antitrust injury," under Texaco's argument the *only* way to remedy the violation would be to *increase* Jake and Jenny's purchase price. Surely, Tom and Terry are not foreclosed from calculating their damages based on the estimated profits they would have experienced had the price differential been eliminated by lowering their purchase price.

that the jury would automatically award damages based upon the amount of discrimination, was alleviated by the court's oral admonitions and instructions to the jury. *See, e.g.*, Ct. Rec. 721 at Instruction No. 28. Thus, it does not appear that the admission of Exhibit 912 "caused substantial harm" to Texaco and, consequently, a new trial is not warranted. *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1137 (9th Cir. 1984).

3. *Jury's Questions:*

At the beginning of the second day of deliberations, the jury transmitted the following written questions to the court:

> Are we to conclude that the self-service gas stations coming into Spokane had nothing to do with loss of gallons to the plaintiff?
>
> Is the issue only that Dompier and Gull were sold gas cheaper?

Had the court answered either of those questions in the negative (as requested by Texaco) the court would have improperly assumed the role of fact-finder and/or advocate. The first question clearly raises a factual issue: the cause(s) of plaintiffs' lost sales was the subject of considerable evidence and argument during the trial. Similarly, had the court answered "no" to the second question, the court would have been, in essence, repeating a portion of defendant's closing argument. The answers to both inquiries rested exclusively within the province of the jury and the court's response kept them there.

Accordingly, the defendant has not set forth sufficient grounds to entitle it to a new trial.[9] The jury's verdicts are neither "contrary to the weight of the evidence," "fundamentally unfair" or "a miscarriage of justice." The verdicts are a reasonable resolution of a difficult case.

9 In addition to the new-trial grounds discussed above, the defendant asserts other grounds. Besides restating its four JNOV grounds as grounds for a new trial, Texaco also argues it is entitled to a new trial due to erroneous instructions. As regards the erroneous instructions ground, Texaco's "overcharge-undercharge," "actual injury to competition" and "proximate cause" arguments have been addressed. The defendant simply has not met either the JNOV standard or established adequate grounds for a new trial.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 11th day of September, 1985.

JUSTIN L. QUACKENBUSH
United States District Judge

No. 87-2048

IN THE

Supreme Court of the United States

October Term, 1987

TEXACO INC.,
Petitioner,

v.

RICKY HASBROUCK,
d/b/a RICK'S TEXACO, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 15, 1988

QUESTIONS PRESENTED FOR REVIEW

Texaco's petition asks the Court to consider arguments which Texaco did not raise in the courts below, and frames questions for review which are argumentative and not reflective of the facts presented at trial. Stated without argument, Texaco's petition raises the following questions for review:[1]

1. May a violation of the Robinson-Patman Act be found where a manufacturer sells at one price to retailers and at a lower price to customers it labels "distributors," where the recipients of the lower "distributor" price do not in fact perform distributor functions and either resell at retail in competition with the retailers charged a higher price, or pass the lower price on to retail customers who compete with the retailers charged a higher price?

2. Is the "competitive effect" element of the Act satisfied where there was a substantial long-standing discrimination in price between Plaintiffs and the favored buyers, and direct evidence that Plaintiffs and others similarly situated lost sales because of the discrimination?

3. In awarding damages for a violation of the Robinson-Patman Act, may the jury consider evidence of what prices the favored and disfavored buyer would have been charged in the absence of the violation, or must the jury assume that, absent the discrimination, the supplier would have charged the favored buyer a higher price?

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[1] Respondents do not agree that these issues have been properly preserved by Texaco. See Argument, *infra*.

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STATEMENT OF THE CASE

Texaco's petition distorts, and in many respects ignores the facts which formed the basis for the jury's finding that Texaco violated the Robinson-Patman Act. A complete statement of the facts follows. These facts clearly demonstrate that Texaco violated the Act and caused substantial injury to Plaintiffs.[2] The opinions of the district court and court of appeals do not punish Texaco for charging uniform wholesale prices to distributors, or force Texaco to discriminate in price among its wholesalers. Rather, the jury's verdict and the opinions of the courts below honor the Act's goal of uniform pricing treatment for all competitors, and apply principles which this Court has repeatedly reaffirmed. The lower court opinions recognize that Texaco's argument would make supplier labels rather than economic substance determinative of Robinson-Patman compliance.

[2] For ease of reference, Respondents are referred to herein as "Plaintiffs."

A. Prior Proceedings.

Plaintiffs were Texaco retail service station dealers in Spokane, Washington who purchased gasoline from Texaco and resold it at retail under the Texaco trademark. From 1972-1981 Texaco sold identical gasoline at substantially lower prices to John Dompier Oil Company ("Dompier") and Gull Oil Company ("Gull"), each of which supplied and operated a chain of retail stations in Spokane. (ER 10, CR 669)[3] Plaintiffs brought suit in 1976 alleging that this price difference violated the Robinson-Patman Act. Texaco raised the two statutory affirmative defenses of "meeting competition" and "cost-justification,"[4] and contested virtually every element of Plaintiffs' case. Texaco argued that Plaintiffs did not compete with the Dompier and Gull stations; that its discounts were "functional discounts" which did not affect competition because Dompier and Gull were "wholesalers"; and that Plaintiffs were injured by factors other than Texaco's price discrimination. During a three-week trial, Plaintiffs presented substantial evidence that Texaco's price discrimination substantially affected competition and caused Plaintiffs to lose sales and profits. The jury returned verdicts for Plaintiffs totaling $449,900.

This was the second jury verdict for Plaintiffs in this case, which has now been pending for well over 12 years. In August 1979, following a four-week trial, a jury returned verdicts for Plaintiffs totaling $849,484. However, following the trial the district court held that its jury instruction based on *Fowler*

[3] References to "ER" and "SER" are to the Excerpts of the Record and the Supplemental Excerpts of the Record in the Court of Appeals; references to "RT" are to the reporter's transcript; references to "Exs." are to trial exhibits; references to "CR" are to the district court Clerk's Record in the court of appeals; references to "App." are to the Appendices to this brief.

[4] Texaco abandoned the cost-justification defense at trial. (SER 37)

Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), had been erroneous and granted judgment n.o.v. for Texaco.[5] On appeal, the Ninth Circuit held that the district court's instruction based on *Fowler* had been proper, and remanded for a second trial with instructions based on this Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), which was decided during the pendency of the appeal. *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).

By its verdicts, the jury rejected Texaco's defenses, and found that Texaco had engaged in unlawful price discrimination which caused injury to Plaintiffs. The district court denied Texaco's motion for judgment n.o.v. or a new trial, holding, *inter alia*, that even without viewing the evidence most favorably to Plaintiffs, the preponderance of the evidence showed that Texaco's price discounts to Dompier and Gull were not lawful "wholesale" or "functional" discounts which merely offset costs incurred by Dompier and Gull in performing distribution functions for Texaco, and that there was substantial evidence of injury to competition and of antitrust injury to Plaintiffs, including direct evidence of diverted sales. *Hasbrouck v. Texaco, Inc.*, 634 F. Supp. 34 (E.D. Wash. 1985), *aff'd*, 830 F.2d 1513 (9th Cir. 1987), *modified and aff'd*, 842 F.2d 1034 (9th Cir. 1988). The Ninth Circuit affirmed, finding that there was substantial evidence to support the jury's finding of liability and award of damages, and that the district court had properly instructed the jury. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988).

[5] *Fowler* held that injury could be inferred from the fact of unlawful price discrimination, entitling the plaintiff to recover damages of at least the amount of the discrimination.

B. Facts Relevant to the Issues Presented for Review.

1. Texaco's Price Discounts to Dompier and Gull.

Texaco charged Plaintiffs a "Retailer Tank Wagon" ("RTW") price, but gave Dompier and Gull substantial discounts off the RTW price because they bought under "distributor" contracts. (ER 31-34; RT 793-94, 1382-83; Exs. 71, 79, 80-83) Texaco gave Dompier, a "branded" distributor, a discount of 3.65¢ - 3.95¢ per gallon prior to 1977, and 2.65¢ thereafter. (ER 33; Exs. 80-83, 791; RT 791-94) In addition, Texaco paid Dompier a "hauling allowance" which compensated Dompier for the cost of transporting gasoline from the pipeline terminal to the stations it supplied. (ER 33; RT 1148-51; Exs. 463, 788) Texaco gave Gull a discount of 4¢- 6¢ off the RTW price. (ER 34; Exs. 79, 378, 380-82, 762, 463)

"Distributors" were supposed to resell at wholesale to commercial accounts and to retail accounts which were too small for Texaco to deliver directly. Their price discount was intended to compensate them for performing this function. (RT 756, 1386-87; Exs. 1, 202 at 35-37) Although Texaco gave Dompier and Gull the label of "distributor," in fact Dompier and Gull functioned almost entirely as *retailers*, operating retail stations which competed directly with Plaintiffs. (ER 32-35; RT 777, 779, 791, 1425-26)

Gull owned a chain of retail stations which marketed under the "Gull" brand (ER 30; RT 685-86), and resold most of its gasoline through its own stations. (ER 35; RT 686-92; Ex. 385) There were as many as 15 Gull stations in the Spokane area during the period covered by the lawsuit. (ER 35; RT 691; Ex. 385) Similarly, in the early 1970's Dompier changed the nature of its business and began to concentrate its sales in high volume retail outlets rather than the small, rural stations which distributors were supposed to supply. (RT 1425-26; Exs. 14, 97) Initially Dompier supplied these high volume retail outlets,

including two stations owned and operated by a corporation affiliated with Dompier,[6] at sizable discounts off the RTW price.[7] However, in mid-1974 Dompier began to take over these stations and operate them directly. (RT 758-59; Exs. 557, 26) By 1978, Dompier owned and was operating six Texaco retail stations and supplied two others owned and operated by the affiliated corporation. Retailing became 85-90% of Dompier's gasoline business. (RT 757) The evidence showed that Texaco encouraged Dompier to expand into retailing and to purchase stations even if it was necessary to pay premium prices for them. (RT 757-58, 848-49; Exs. 11, 12)

When operating retail stations Dompier and Gull performed no functions which Plaintiffs did not also perform. (RT 1091-1109, 3326; Ex. 910; ER 89) Dompier's president acknowledged that Dompier needed no wholesale salesman to "sell" gasoline to itself, had no wholesale credit risks in "selling" to itself, and had no inventory or administrative expenses different from those of Plaintiffs. (RT 1091-1109; Ex. 910) The one "wholesale" function which Dompier did perform was the function of delivering gasoline in bulk to the stations. However, this function is irrelevant to Texaco's "functional discount" argument because Texaco paid Dompier a hauling allowance which fully compensated Dompier for

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[6] The corporation, Red Carpet Car Wash, Inc., had the same address as Dompier and common officers and directors (RT 760-62, 797, 1110-14; Exs. 470, 562), and John K. Dompier wholly owned both John Dompier Oil Co. and Red Carpet Car until 1973 when he retired and his son began purchasing his interest in Dompier on a long-term contract. (RT 1110-14; Exs. 470,562)

[7] In 1972 and 1973, Dompier supplied six stations at prices 2.65¢ - 3.4¢ below the RTW price. This included the two "Red Carpet" stations. *See* note 6. (RT 780-810, 2903-06; Exs. 471, 791, 788, 789, 792, 800, 804) Dompier continued supplying these stations at discounts below the RTW price until approximately January 1974. (*Id.*; RT 789-819; Exs. 471, 800, 804)

this function.[8] (RT 1148; Ex. 1) A Texaco vice president acknowledged that distributors were supposed to resell gasoline at wholesale rather than retail (RT 1386-87), but Texaco had no guidelines to determine whether a purchaser receiving a discount was in fact functioning as a distributor. (RT 1386-87) Texaco continued granting the discount even though it knew Dompier was reselling at retail and passing the discount on to stations it supplied. (RT 1626-34, 2903-08; Exs. 1, 202) In 1976 Texaco questioned whether Dompier was performing wholesale functions but renewed its distributor contract anyway. (RT 1087-89; Ex. 41) In short, the evidence clearly showed that Texaco's granting of price discounts was not based on the functions the buyer performed, but merely on the label Texaco assigned to the buyer.

Although prior to mid-1974 Dompier did engage in some reselling at wholesale, even during this brief period Dompier passed all or most of its discount through to the retail stations it supplied, selling to them at prices well below the RTW price paid by Plaintiffs.[9] (RT 808-09; Exs. 471, 729, 791, 800) Dompier could pass on the discount because it was not performing the functions for which the wholesale discount was intended. For example, Dompier did not take delivery of Texaco gasoline into its own bulk plant storage and then

[8] Historically Texaco paid distributors a hauling allowance to compensate them for hauling gasoline from the pipeline terminal into *the distributor's bulk storage plant*, from which the distributor redelivered the gasoline in smaller loads to customers whose stations were too small to take large deliveries. (Ex. 1 at 2-3; RT 2072-74) However, Dompier had little or no bulk storage, and typically picked up gasoline at the pipeline terminal and delivered it directly to its retail stations. (RT 769-73, 1092-95; Ex. 788) Texaco's vice president testified that this abused the function of the hauling allowance. (RT 2075) Thus, the hauling allowance fully compensated Dompier for its deliveries (RT 769-73).

[9] *See* note 7, *supra*. Dompier's invoices to its customers during the years 1972-1974 were in evidence. (Ex. 792)

distribute the gasoline in small loads to small retailers — the traditional function of a "distributor." Rather, Dompier supplied large, urban stations by deliveries directly from the pipeline terminal and was paid a hauling allowance which covered all its costs.[10] The stations Dompier supplied used their lower buying price to sell at lower retail prices and divert sales from the Plaintiffs. See App. A. For example, when Dompier began supplying one large retail station in 1971, that station was able to post a retail price which was only $\frac{3}{10}$¢ above the buying price of a station operated by a Plaintiff a few blocks away. (RT 493)

Texaco's management recognized that Dompier and other distributors were not performing the distribution function for which the discount was intended, and were utilizing their price discount and hauling allowance to post lower retail prices. (RT 756-57, 2903-04; Exs. 1, 202 at 35-37, 215 at 3) Texaco's vice president stated:

> For many years, we have sold gasoline to distributors at a discount of approximately 3½¢ per gallon from the price charged our independent retailers. This discount was traditionally justified by the many important services distributors performed when they physically "distributed" this gasoline among many customers, most of whom required small volume deliveries. These traditional functions continue to be performed by most of our distributors operating in rural areas, who serve various farm and other small volume accounts including service stations . . . On the other hand, urban distributors have significantly changed their methods of operation over the past few years, particularly since the advent of the gasoline shortage several years ago. *These distributors are shedding many of their traditional functions and have concentrated their sales in very high volume outlets. This has reduced their per gallon overhead cost to the point where a good*

[10] *See* note 8, *supra*.

portion of the discount is not being utilized to defray their costs of distribution at all.

In addition to this traditional discount, many of these distributors have been obtaining added savings through the manipulation of their hauling allowance... This amount can provide a significant marketing advantage to a distributor when he is not, in fact, incurring the cost of hauling the gasoline to his bulk facility.

(Ex. 1 at 2-3, emphasis added)[11]

Texaco knew that Dompier was not using the discount to compensate for wholesale functions, even when Dompier resold at wholesale. A Texaco sales representative testified that Texaco's Spokane management acknowledged Dompier was passing on the discount (RT 1631-32, 2903-08), and that he received constant complaints from Plaintiffs about the prices of the Dompier stations (RT 1632-33). Other evidence also established Texaco's knowledge. (Exs. 1, 202) Texaco's sales department observed that "some wholesalers are selling retailers at significant discounts... often taking the hauling allowance and little more as their wholesale profit." (Exs. 1, 202 at 36).

2. *Evidence of Injury Causally Related to Price Discrimination.*

Texaco's price discrimination directly affected competition and diverted sales from Plaintiffs to the Dompier and Gull stations. (App. A)[12] The retail gasoline market in Spokane was characterized by strong competition and low profit margins. (RT 799, 824, 1114-16, 1124-25, 704-09) A station's retail

[11] Exhibit 1 is set forth in full as Appendix B. Bracketed portions of the exhibit were not admitted at trial. *See* Note 15.

[12] Appendix A summarizes in detail the evidence of injury to competition and to Plaintiffs as a result of the price discrimination.

gasoline price was a very important factor in its success (RT 705, 838, 1391-95, 1114-16, 1124-25, 1403), and affected other aspects of a retail dealer's business. (RT 254, 1768-70, 1500-02; Ex. 201 at 8-1, 8-2) The Dompier and Gull stations were for the most part located close to Plaintiffs' stations, on or near the same traffic arterials. (Ex. 385) Because of its relatively small geographic size and the pattern of its streets, Spokane has substantial cross-city traffic, and there was effective competition among stations over relatively broad areas. (RT 498, 1715-21, 2908-09, 1824, 1918-19) Gull's vice president testified that gasoline prices tended to move city-wide due to Spokane motorists' high degree of mobility. (RT 703-04) All the Dompier stations were "Texaco" stations which displayed the same Texaco sign and colors, used the same Texaco promotional devices, and honored the same Texaco credit card as Plaintiffs. (ER 34-35; RT 1425-26, 1096-98)

Dompier and Gull used their price advantage to sell gasoline at retail prices several cents lower than Plaintiffs. (RT 708) A Gull executive characterized the Dompier stations as aggressive marketers which priced below their competition. (RT 704-05) They could do this because of the price discount they received; Dompier's president testified that if Texaco had discontinued his price discount he would have had to increase his stations' retail prices. (RT 853-54)

Many Spokane residents testified that they discontinued purchases from Plaintiffs because Dompier and Gull had lower prices. (App. A) Several Plaintiffs could identify specific customers lost to Dompier and Gull because they observed the customers in the Dompier and Gull stations, saw Dompier and Gull credit card invoices in customers' automobiles when servicing them, or had discussions with disgruntled former customers who complained that Plaintiffs' prices were higher than the Dompier station prices. (RT 238, 243, 315, 401, 530, 600-01, 657-58, 1558, 1244-45, 1290; App. A)

The results of this competitive situation were dramatic. Between 1970 and 1975, Dompier's monthly sales volume almost tripled (from 155,152 gallons to 462,956 gallons), while Texaco's monthly "throughput" gallonage in Spokane (*i.e.*, gallonage sold to Texaco dealers such as Plaintiffs) fell from 569,269 gallons to 389,557. (Ex. 215; RT 1090) Whereas in 1970 Dompier accounted for only 20.7% of the Spokane retail volume, only four years later its share had grown to almost 50%. (Ex. 215 at 2) The share of independent retailers, however, declined from 76% to 42% (*id.*), and Plaintiffs' sales either declined or showed little or no growth. (Exs. 709-21, 127, 128, 33, 39, 374, 645, 648-57) Eight Dompier stations were outselling 19 independent dealers. (RT 1477; Ex. 215 at 2) From 1975 to 1978, Dompier's annual sales increased an additional 1,200,000 gallons (RT 767; Exs. 82-83), whereas by 1978 seven of the thirteen plaintiff stations had closed. (Exs. 709-21; App. A) Similar growth occurred with the Gull stations.[13]

Numerous exhibits and witnesses confirmed that it was Texaco's price discrimination which caused these effects. Several witnesses, including a Gull executive and Dompier's president, testified that a competitor with a lower buying price necessarily had a competitive advantage (RT 838-48, 853-54), and that a price difference of one or two cents would cause substantial shifts in sales. (RT 704-09, 1115-24) Mr. Dompier testified that a Plaintiff who tried to match his retail price would be forced out of business because the Plaintiff had to pay Texaco a higher price for his gasoline.[14]

[13] Between 1973 and 1976 (the years for which complete Gull volume data was available), Gull's retail volume through its five major stations increased 87%. (Exs. 762-64, 769)

[14] As an example, Mr. Dompier testified that in November 1975 he made $7,567.82 in gross profit at one of his stations, but that a Plaintiff selling at the same retail price would have made a gross profit of only $1,139.24. He concluded that a Plaintiff who tried to meet his retail price "would probably go out of the gasoline business." (RT 840-48; Ex. 588)

Texaco's marketing department acknowledged that even if independent retailers converted to self-service they could not compete with distributor stations because of their higher buying price. (Ex. 202 at 36) Texaco's corporate vice president admitted that Texaco's policy of giving discounts and hauling allowances to distributors who were not performing distributor functions had caused a dramatic increase in distributor sales and "an equally dramatic decrease" in sales by independent retailers. (Ex. 1 at 1) He concluded that "a good portion of the [distributor] discount is not being utilized to defray their costs of distribution at all" (*id.* at 2), and that the size of the distributor discount was the cause of the independent retailers' losses:

> We believe that the dramatic shift in gasoline sales from the independent retailer class of purchaser to the independent distributor class of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance. We believe that they are inconsistent with the realities of gasoline marketing today.

(Ex. 1 at 3) Similarly, Texaco's marketing vice president acknowledged that the distributor discount had caused "rampant and alarming" increases in distributor sales and dramatic shifts in volume away from independent dealers. (RT 1413-14; Ex. 2) He admitted that the distributor discount was the "root cause" of the independent dealers' losses. (RT 1415-16)

Texaco's Spokane personnel drew the identical conclusion about the effects of its price discrimination in Spokane. A Texaco sales representative stated that Dompier had "a retail marketing advantage over our present contract retailers and investment retailers with which they cannot compete." (Ex. 215 at 3) Another Texaco sales representative testified that the Dompier stations were Plaintiffs' principal competition, and that Plaintiffs could not compete with those stations due

to Dompier's buying discount. (RT 1626, 1636-37, 2903-08) In fact, it was Texaco's Spokane management who best summarized the effects of Texaco's pricing policy in Spokane. They called Texaco's price discrimination a "two-headed snake," and believed that Texaco would have to decide on one method of pricing or the other because the two were in conflict. (RT 1632-34)

3. Plaintiffs' Damages Evidence.

In *J. Truett Payne*, this Court held that a plaintiff injured by a violation of the Robinson-Patman Act may recover the sales and profits he would have gained had there been no discrimination. 451 U.S. at 566-67. To estimate their damages, Plaintiffs presented the testimony of Dr. Keith Leffler, an economist in the University of Washington's Department of Economics. Dr. Leffler studied the Spokane market, the testimony and relevant data, including data on the sales volumes and prices of the Plaintiff, Dompier and Gull stations. He concluded that Texaco's price discrimination had injured Plaintiffs and estimated the sales and profits Plaintiffs would have made absent the discrimination. (RT 1746-47) He did not do this, as Texaco suggests, merely by mechanically assuming that Plaintiffs should have had a lower price.

Texaco could have eliminated the discrimination either by raising the Dompier price, by lowering Plaintiffs' price, or by a combination of the two. There was evidence supporting each of the three possibilities.[15] Therefore Dr. Leffler considered

[15] For example, Texaco considered reducing the price it charged independent retailers such as Plaintiffs (Ex. 1 at 4; Ex. 202 at 35-40). In 1976 Texaco reduced the Dompier discount by one cent. (ER 33) Texaco also considered reducing Plaintiffs' price somewhat and increasing the distributor price somewhat, and considered raising the distributor price without a corresponding raise of the independent retailers' price. (Ex. 202 at 35-40) *See also*

(footnote continued on next page)

what Plaintiffs' and Dompier's buying prices would have been if the discrimination had been eliminated in each of the three ways. (RT 1736-38) He also considered how Dompier and Plaintiffs would have priced at retail if the discrimination had been eliminated, since Plaintiffs' sales volumes were affected by the level of Dompier's and Plaintiffs' retail prices. (RT 1738-40, 1770)[16]

Using a statistical regression analysis, Dr. Leffler determined the actual, observed effects of changes in the retail prices of the Dompier and Plaintiff stations on Plaintiffs' sales. From this he estimated the sales and profits which Plaintiffs would have gained in the absence of Texaco's price discrimination. He did not limit himself to the artificial assumption (urged by Texaco) that Texaco would have eliminated the discrimination only by raising Dompier's price by the full amount of the discrimination. Rather, consistent with this Court's admonition in *J. Truett Payne* that damages are to estimate "what plaintiff's situation would have been in the absence of defendant's antitrust violation," 451 U.S. at 566,

Ex. 1 at 4 (unexcised version contained in App. B) The bracketed portions of Exhibit 1 were excised because they related to Texaco's defense — which the district court and court of appeals rejected — that federal regulations immunized its pricing practices. However, the unexcised exhibit was properly considered by Dr. Leffler in arriving at his expert opinion concerning how Texaco most likely would have eliminated the discrimination. Fed. R. Evid. 703.

[16] Mr. Dompier testified that if Texaco had increased his price, he would have increased his retail price. (RT 853-54) Plaintiffs testified that if Texaco had reduced their price they would have lowered their retail prices by all or a part of the reduction, thus selling more gasoline at the same or greater profit margin. Dr. Leffler gave his economic opinion as to which reaction would have been most likely, but performed alternate damage calculations based upon the various possible reactions, since how Dompier and Plaintiffs would have reacted was a fact question for the jury. (RT 1764-67)

Dr. Leffler estimated damages by taking into account the three possible ways Texaco could have eliminated the discrimination and the ways Dompier and Plaintiffs would have reacted to the elimination of the discrimination. (RT 1749-73; Exs. 913-18)

The determination of what would have occurred absent the discrimination was an inherently factual question for the jury. The resulting damages awards were very conservative; the combined verdicts represent an average award of only $5,486.59 per year for each Plaintiff, representing only a few additional customers per day.[17] (RT 2928-32; Ex. 932)

SUMMARY OF ARGUMENT

The district court and court of appeals opinions do not conflict with the decision of any other circuit court or of this Court. The trial record clearly established that, despite their "distributor" classification, Dompier and Gull in fact functioned as retailers in competition with Plaintiffs, and that even during the brief period when Dompier resold at wholesale the discount was passed on with Texaco's knowledge to Dompier-supplied retailers who competed with Plaintiffs. The courts below properly applied the decisions of this Court which hold that price discrimination which has a reasonable possibility of lessening competition violates the Robinson-Patman Act irrespective of the level in the distribution chain at which the competitive effect occurs, and irrespective of the formal label a supplier uses for its customer.

Economic substance, not suppliers' labels, determines Robinson-Patman compliance. Texaco would have the Court disregard economic substance and permit suppliers to violate the Act simply by assigning favorable "functional" labels to

[17] Plaintiffs operated 13 stations during the damage period which were open for an average of 6½ years per station.

preferred customers or by adding levels to the distribution chain. Similarly, Texaco would elevate fiction over fact by forcing the jury to award damages based solely on an artificial assumption unrelated to what the Plaintiffs' situation actually would have been absent the violation. No opinion of this Court or any other court supports such a result.

ARGUMENT

I. The Price Differential Was Not A Lawful Functional Discount.

Texaco argues that the lower court opinions "conflict with long established legal principles," and require Texaco to unlawfully discriminate among its wholesalers on the basis of wholesaler costs. There is serious question whether Texaco has properly preserved this argument.[18] Moreover, even if it has, the argument finds no support in the Robinson-Patman Act or any decision of this Court interpreting it.

The Robinson-Patman Act's fundamental purpose is to provide competitors equivalent prices so that all will start from the same position. *See F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 520 (1963). The Act prohibits price discriminations that may "substantially lessen competition." Therefore, the existence of a competitive situation is required for a violation. Kintner, *A Robinson-Patman Primer* 152-53 (2d ed. 1979). If the

[18] The argument that the district court's instructions or decision would require Texaco to unlawfully discriminate in price among wholesalers was not presented to the district court or the court of appeals. Texaco simply argued there was insufficient evidence to support the verdict because (Texaco claimed) its price discounts were simply wholesale discounts. *See* ER 101; Brief of Appellant at 12. Thus, the issue as presented to this Court was not properly preserved. *City of Springfield v. Kibbe*, 107 S.Ct. 1114, 1115-16 (1987); *E.E.O.C. v. F.L.R.A.*, 476 U.S. 19, 24 (1986).

recipient of a "wholesale" discount in fact functions as a wholesaler, and does not compete with retailers or others charged a higher price, the difference in prices does not violate the Act since the requisite effect on competition is absent. On the other hand, if the price discrimination causes anticompetitive effects, the Act proscribes it regardless whether the supplier labels the discount a "wholesale" or "distributor" discount. "There is general agreement that the legality of functional price differentials depends on whether they give rise to anticompetitive effects." Monograph, *The Robinson-Patman Act: Policy and Law, Volume 1* 59 (ABA, Section of Antitrust Law 1980).

Texaco asks the Court to disregard the Act's fundamental focus on competitive effect. Texaco would have the Court hold that a supplier may grant discounts to a customer it labels a "distributor" irrespective of whether the "distributor" in fact performs wholesale functions, and irrespective of whether the "distributor" in fact resells at retail in competition with retailers charged higher prices, so long as the supplier charges the same price to all customers the supplier calls "distributors." But this Court has long held that substance, not suppliers' labels, controls Robinson-Patman compliance. For example, in *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952), the Court upheld an order of the Federal Trade Commission prohibiting wholesale discounts to buyers of roofing materials who *in fact* functioned as applicators (retailers):

> . . . [T]here was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding, the Commissioner disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers, and stated its order in terms of "purchasers who in fact compete." Thus stated, we think the order is understandable, reasonably related to the facts shown by the evidence, and within the broad discretion which the Commission possesses in determining remedies.

343 U.S. at 475.

Thus, in applying the Robinson-Patman Act to functional discounts courts have consistently focused not on labels but on substance — *i.e.*, whether customers of the seller in fact compete and whether the price discrimination may substantially lessen competition. *Ruberoid*, 343 U.S. at 475; *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974) ("[T]he litmus test of a wholesaler is the character of his selling, not his buying"); Monograph, *supra*, at 59; Kintner, *supra* at 152-158.

> Functional pricing difficulties sometimes arise because a complexity of class designations are assigned to customers who really are in competition with one another. The artificial nomenclature solves nothing. The competitive realities govern, not the manufacturer's internal terminology. . . .

Schniderman, *Price Discrimination in Perspective* 37 (ALI/ABA 1977). Where, as in this case, a manufacturer sells to a customer with dual functions (*e.g.*, a customer which resells at wholesale and retail), the manufacturer may provide a wholesale discount only to the extent the customer in fact functions as a wholesaler because "[a] straight distributor discount would give an inordinate advantage over competing retailers . . . ." Kintner, *supra* at 155.

This principle has been applied in the gasoline industry on remarkably similar facts. In the *Standard Oil* litigation, the Act was held to prohibit discounts to "jobbers" who were not required to, and in fact did not resell at wholesale but at

retail, where the effect of the discounts was to injure competition. *Standard Oil Co.*, 41 F.T.C. 263, 272-73 (1945), *modified*, 43 F.T.C. 56 (1946), *modified and aff'd*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).

Nor is Texaco's argument any more persuasive as applied to the brief period prior to 1974 when Dompier resold gasoline at wholesale. This Court has squarely held that price discrimination may violate the Robinson-Patman Act even if the favored and disfavored buyer do not operate at the same level of the distribution chain. *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). This simply honors the plain language of the Act, which prohibits price discrimination "where the effect of such discrimination may be . . . to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination *or with customers of either of them* . . . ." 15 U.S.C. § 13(a) (emphasis added). "[T]he competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers . . . ." *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983). Thus, where a price discrimination results in injury to competition between direct buying retailers and *customers* (or customers of customers) of one who receives a wholesale discount, actionable "third-line" or "fourth-line" injury results. *Perkins*, 395 U.S. at 647-48.[19]

[19] "Third-line" injury results where price discrimination affects competition between the disfavored buyer and customers of the favored buyer. *Boise Cascade Corp.*, [1983-87 FTC Complaints and Orders Transfer Binder] Trade Reg. Rep. (CCH), ¶22,330 at 23,296 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). *See Falls City*, 460 U.S. at 436; *Standard Oil Co. v. F.T.C.*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1040 n.46 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982);

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Perkins holds that even *fourth*-line injury is actionable when a supplier's wholesale discount is passed on to retailers who use the price advantage to take sales from direct-buying retailers who were charged a higher price:

> Here, Perkins' injuries resulted in part from impaired competition with a customer (Regal) of a customer (Western Hyway) of the favored purchaser (Signal). The Court of Appeals termed these injuries "fourth level" and held that they were not protected by the Robinson-Patman Act. We conclude that *this limitation is wholly an artificial one and is completely unwarranted by the language or purpose of the Act.*
>
> . . . From Perkins' point of view, the competitive harm done him by Standard is no less because of the presence of an additional link in this particular distribution chain from the producer to the retailers. Here, Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act.

395 U.S. at 647-48 (emphasis added). Recent opinions of this Court confirm the continued viability of this fundamental principle. *Falls City*, 460 U.S. at 436; *J. Truett Payne*, 451 U.S. at 562.[20]

See also Kintner, *supra* at 110-12, 164-71 ("Actionable competitive injury may arise at any level in the distribution scheme . . . ."); 5 Von Kalinowski, *Antitrust and Trade Regulation* §§ 31.02-31.03 (1988).

[20] The district court's instruction on actionable third-line injury was directly based on the holding in *Perkins*. However, it went beyond the requirements of *Perkins* since it required the jury to find that Texaco knew that Dompier was passing on the discount to its customers.

The court's instruction did not require Texaco to police the prices charged by its customers in violation of the Sherman Act.

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The court of appeals decision plainly does not require a supplier to engage in unlawful price discrimination among its "distributor" customers.[21] The court's decision does recognize that suppliers have a responsibility to charge prices based on functions which their customers are in fact performing. The burden this may place on a supplier to ensure that its customers are in fact entitled to price discounts is not only warranted but required by the Robinson-Patman Act. It is not a new burden but one of which suppliers have been aware and under which they have operated without difficulty for many years.[22] To relieve suppliers of the responsibility to price according to their customers' functions would reduce the Act to a nullity.

This case provides a clear example of what the effect of Texaco's argument would be. Although they bought under "distributor" contracts, the evidence was virtually overwhelming that Dompier and Gull competed directly with

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as Texaco contends. Texaco was not powerless to prevent a pre-July 1974 violation, but could have altered its price either to the plaintiffs or to Dompier, as it recognized in recommending a change to "rack" pricing (Ex. 202 at 35-37). *See* note 15, *supra.*

[21] This argument, even if otherwise valid, would have no application to the facts of this case and has no support in the record. Texaco distributors were located in separate towns and served separate geographic areas, with different competitive conditions. (RT 2348) There was no evidence in this case of any other Texaco distributor competing with Dompier in the Spokane market. Thus, price differences among "distributor" customers on this record would not affect competition as required by the Act.

[22] For example, the *Standard Oil* litigation dates from the mid-1940's. This Court decided *Ruberoid* and *Perkins* in 1952 and 1969, respectively. The FTC's *Doubleday* and *Mueller* decisions, decided in 1955 and 1962, respectively, made it abundantly clear that the Act applies to functional discounts. *Doubleday & Co.*, 52 F.T.C. 169 (1955); *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). *See* note 24, *infra.*

Plaintiffs in retail sales; that when they did resell at wholesale they performed few if any wholesale functions and passed on all or most of their discount to customers who competed directly with Plaintiffs; that sales were diverted from Plaintiffs to the Dompier and Gull stations; and that the Dompier and Gull stations flourished and grew while the Plaintiff stations stagnated and gradually disappeared. To hold that these effects of Texaco's price discrimination should be disregarded would gut the Act's language and intent.

No other courts of appeal have so held. *White Industries, Inc. v. Cessna Aircraft Co.*, 1988-1 Trade Cas. (CCH) ¶67,992 (8th Cir. 1988), cited by Texaco, was a markedly different case which properly holds that true functional discounts with no adverse effect on competition do not violate the Act.[23] *Boise Cascade Corp. v. F.T.C.*, 837 F.2d 1127 (D.C. Cir. 1988), the only other case cited by Texaco, turned on the issue of whether competitive injury had been shown where there was no direct evidence of lost sales. 847 F.2d at 1143, 1146, 1148. Because it remanded the case for further proceedings, the court did not need to decide whether functional discounts should be judged by the Commission's *Mueller* rule or the less restrictive

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[23] In *White Industries* a retail dealer sought the same price as a wholesaler so that he could resell to other dealers. There was no evidence that any Cessna distributor had passed a discount on to dealer customers, nor any evidence that the distributors were not in fact performing distribution functions. (p.58,087) Distributors had sold to end users in competition with dealers in only a few instances, and there was no evidence that the plaintiff had lost any sales. (p.58,085) *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1978), *cert. denied*, 429 U.S. 1097 (1977), also cited by Texaco, did not even involve a sale to two different purchasers at different prices. The Second Circuit simply held that the Plaintiff, which purchased parts not from Ford but from a Ford dealer, had no standing to complain when Ford withdrew a price discount from all its dealers.

Doubleday rule, either of which supports a finding of violation in this case.[24]

II. There Was Ample Evidence Of Injury To Competition

The Robinson-Patman Act requires a plaintiff to establish that the effect of the price differential "may be substantially to lessen competition." In *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948), this Court held that a prima facie showing of this "competitive effect" requirement may be made by proof of a substantial price discrimination between competing purchasers over time. Texaco asserts that if the favored buyer is a "wholesaler" and the disfavored buyer a retailer the *Morton Salt* inference does not apply, and that the district court's instruction based on *Morton Salt* established "what is essentially a *per se* rule of illegality." (Pet. at 13)[25]

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[24] 837 F.2d at 1148 n.19. In *Mueller* the FTC held that a violation occurs when a supplier gives a "wholesale" discount to a purchaser who resells at retail and the discount affects competition, without the necessity to inquire into whether the size of the discount is reasonably related to costs incurred by the favored buyer in performing wholesale functions. In *Doubleday*, which *Mueller* overruled, the Commission held that in some circumstances evidence of services performed by the buyer should be considered in determining the legality of a wholesale discount. *Boise Cascade Corp.*, Trade Reg. Rep. (CCH) ¶22,330 at 23,394 (1986).

Both the *Mueller* and *Doubleday* rules recognize that functional discounts can violate the Robinson-Patman Act. Here the evidence supported a violation under either the *Mueller* or *Doubleday* rule. Under the *Doubleday* rule the trier of fact must determine whether the discount was reasonably related to the cost of functions the buyer performed. Here the district court freely permitted Texaco to introduce evidence concerning services allegedly provided by Dompier and Gull, but Texaco made no real effort to quantify such services.

[25] Texaco's argument that the district court should have instructed the jury that the Act required Plaintiffs to prove an *actual* impact

(footnote continued on next page)

Texaco did not object to the district court's jury instruction based on *Morton Salt* (RT 3111, CR 739), and did not challenge the court's *Morton Salt* instruction in the court of appeals. Accordingly, Texaco failed to preserve this issue for review and it is not appropriate for review by the Court. *City of Springfield v. Kibbe*, 107 S.Ct. at 1115-16.

Moreover, the district court's instruction was proper even if Texaco had properly preserved an objection to it. *Morton Salt* recognizes "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." 334 U.S. at 46-47. This Court has recognized that the logic of this inference applies not only where the competitive effect is felt at the level of the favored and disfavored buyers, but also where it is felt at the level of their customers. *Falls City*, 460 U.S. at 436. If the disfavored buyer in fact competes with the favored buyer, he suffers the same competitive disadvantage which the court identified in *Morton Salt* irrespective of whether the favored buyer is labeled a wholesaler and the other a retailer. To hold otherwise would honor suppliers' labels at the expense of economic substance.

Boise Cascade Corp. v. F.T.C. does not cast doubt on the application of the *Morton Salt* inference here. To the contrary, the D.C. Circuit expressly found that "[t]he *Morton Salt* inference is . . . alive and well in the law," 837 F.2d at 1139, and confirmed that it "was properly relied upon here to establish a *prima facie* case of competitive injury." *Id.* at 1146 n.16. The court remanded the case to the FTC for further proceedings because there was no evidence that disfavored

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upon competition is plainly incorrect. *J. Truett Payne*, 451 U.S. at 561-62; *Falls City*, 460 U.S. at 434-35. Texaco confuses the standard for proof of a violation of the Act with the requirement that a plaintiff prove actual injury by reason of the violation in order to recover damages.

buyers had lost sales to Boise, *id.* at 1135, 1145, and the FTC had not considered evidence which Boise offered to rebut the *Morton Salt* inference of competitive injury. *Id.* at 1144-46. Here, on the other hand, there was substantial direct evidence that Plaintiffs lost sales to Dompier and Gull, and Texaco had ample opportunity to show that competition was not likely to be affected by its price discrimination. The district court instructed the jury that it was not required to infer competitive effect (SER 59; RT 3337), and gave the jury every opportunity to accept Texaco's arguments. (SER 541-44) Texaco's real complaint is that the jury did not find its evidence persuasive. This disappointment with the result of a factual finding is hardly a basis for review by this Court.[26]

III. The Jury Properly Considered Evidence Of What Plaintiffs' Situation Would Have Been Absent The Violation

Texaco argues that a plaintiff may prove damages only by making the artificial assumption that, in the absence of the price discrimination, the supplier would have charged the favored buyer a higher price, and that Plaintiffs' proof of injury and damages was predicated on an improper theory that Plaintiffs had been "overcharged." In fact, Plaintiffs' evidence

[26] For example, Texaco argued that Plaintiffs faced serious competition from other brands of service stations, and that it was this competition, and not Texaco's price discrimination, which affected competition. But the evidence showed that in the face of this allegedly withering competition from others, Dompier and Gull not only survived but flourished, while Plaintiffs had the opposite experience. It is a logical inference that the Dompier and Gull discount was the reason for this difference.

and the district court's instructions scrupulously complied with *J. Pruett Payne*'s requirements.[27]

The Court's focus in *J. Truett Payne* was on whether the plaintiff had presented sufficient evidence of injury to support a damages award. 451 U.S. at 567, n.5. The Court held that proof of a violation of the Act does not alone constitute injury, 451 U.S. at 562, and suggested that Payne was "arguably foreclosed" from establishing injury since the price discount involved was extremely small and there was no evidence that the favored buyer had used the discount to sell cars at lower retail prices. *Id.* at 564 n.4.[28] The Court reiterated that if injury is established, precise proof of damages is not necessary since "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation." *Id.* at 566. The Court reaffirmed its holding in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) that:

> [T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict

[27] This argument again has not been fully preserved. Texaco did not object to the damage instruction given by the district court (RT 3134-36), did not object to the testimony of Plaintiffs' economic expert or Plaintiffs' damage exhibits, and presented no alternative measure of damages. Texaco merely objected to the damages exhibits for "lack of foundation." (RT 1754-56, 1761, 1763, 1773) Texaco thus waived its assertions of error. Fed. R. Evid. 103(a); *Vallejos v. C.E. Glass Co.*, 583 F.2d 507 (10th Cir. 1978). Since Texaco failed to provide an alternate damage theory, it is precluded from arguing that any other theory of damages might have been more reasonable. *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).

[28] The price discrimination amounted to approximately $11 on the price of a new car, a miniscule amount compared to the discrimination here. *See Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982).

accordingly. In some circumstances "juries are allowed to act on probable and inferential as well as upon direct and positive proof."... Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

327 U.S. at 264-65.

Nowhere does *J. Truett Payne* suggest that a plaintiff may prove damages only by assuming that, in the absence of the price discrimination, the seller would have charged the favored buyer a higher price. Such a rule would be inconsistent with reality, and with the Court's reaffirmation that the jury is to estimate "what plaintiff's situation would have been in the absence of defendant's antitrust violation." 451 U.S. at 566. In accordance with *J. Truett Payne*, Plaintiffs placed before the jury evidence of what their situation would have been absent the price discrimination. This involved an inherently factual determination for the jury of how Texaco would have priced absent the discrimination, and of how Plaintiffs and Dompier would have reacted to the absence of the discrimination. Texaco could have eliminated the discrimination by increasing the Dompier price, reducing the Plaintiffs' price, or by a combination of the two, and there was evidence that Texaco had considered all three alternatives.[29] Plaintiffs provided the jury with an estimate of damages under each of the three alternatives. The determination of the damages based on this evidence was properly left to the jury.

Plaintiffs thus presented the best evidence possible of what Plaintiffs' situation "would have been in the absence of

[29] *See* note 15, *supra*.

[Texaco's] antitrust violation." 451 U.S. at 566. The court of appeals correctly concluded that the damage awards were not based on a theory that Plaintiffs had been "overcharged," but on actual evidence of what Plaintiffs' market situation would have been. 842 F.2d at 1043-44.[30]

This Court recognized in *J. Truett Payne* that where, as here, "the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." 451 U.S. at 567. Yet Texaco's argument would do exactly that, denying Plaintiffs relief based on an artificial assumption unsupported by the evidence. Plaintiffs clearly proved they were injured by reason of Texaco's pricing, and presented a realistic and reasonable estimate of what their situation would have been absent the violation. That is precisely what *J. Truett Payne* requires.

[30] Both during the trial (RT 1722-24) and in its final instructions (SER 68), the court told the jury they could not award damages merely by reference to the price difference, but could only award damages proximately caused by the price discrimination.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that Texaco's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

APPENDIX A

SUMMARY OF EVIDENCE ON COMPETITION AND INJURY

I. GROWTH OF DOMPIER AT EXPENSE OF PLAINTIFFS.

1. Between 1970 and 1975, Dompier's monthly sales volume almost tripled, whereas during the same period of time Texaco's monthly "throughput" gallonage in Spokane fell from 569,269 gallons to 389,557. (Ex. 215) Where as Dompier accounted for only 20.7% of the Spokane District retail marketing volume in 1970, only four years later its share had grown to almost 50%. (Ex. 215, p.2)

2. The share of directly-supplied retailers like the Plaintiffs declined from 76% to 42% (Ex. 215, p.2), and the Plaintiffs' sales either declined or showed little or no growth (Exs. 709, 721, 645, 657), and eight Dompier stations were outselling 19 independent dealers.

(RT 1477; Ex. 215, p.2) From 1975 to 1978, Dompier's annual sales increased an additional 1,200,000 gallons. (RT 767; Exs. 82, 83)

3. By the middle 1970s, 85-90% of the gasoline business of John Dompier Oil Company consisted of the sale of gasoline at retail. (RT 757)

4. During the early 1970s, Texaco encouraged Dompier and other distributors to develop its own retail outlets. (RT 1465, 2055-2058)

5. Texaco's Spokane representatives encouraged Dompier to purchase stations even if he had to pay more than their actual value to obtain them. (RT 755-778, 848-849)

6. At the same time Dompier's gasoline volume was increasing, Texaco management was criticizing the Portland Region's

decrease in "throughput volume" (gasoline volume at stations like the Plaintiffs). (Exs. 33, 127, 374, 128, 39; RT 2066-2067)

7. At the same time Dompier was being encouraged to enter the retail market, Texaco encouraged Plaintiffs to stress service to the public at their stations. (RT 1454-1460, 1634-1636; Exs. 123, 37, 39, 911)

8. Texaco's local management was aware that Dompier began to concentrate its sales in high volume outlets. (Ex. 215; RT 1460-1469)

9. By 1978 the gasoline sales by the John Dompier Oil Company had increased 270% from the figures of 1970. (Ex. 215)

10. Under its "Fill the Gap" program Texaco "encouraged and motivated [distributors] . . . to select and develop prime sites, thereby improving retail represen-

tation . . . ." (Ex. 11, p.1) Texaco's wholesale Manager set an objective of three new distributor stations for the Spokane District under this program. (Exs. 12, 23; RT 158, 1446-1453)

11. Mr. Fisher, Texaco's Vice President, testified that the shift in sales from Texaco's retail class of trade to distributor class of trade was caused almost entirely by the magnitude of the distributor discount. (RT 1413-1416)

12. Texaco's management received complaints concerning the retail pricing of the stations supplied by John Dompier Oil Company and Texaco representatives acknowledged that the John Dompier Oil Company was passing through a portion of its wholesale discount to the stations which it supplied. (RT 2903-2906, 1632-1633, 403, 1555, 734-735)

13. Mr. Andy Evans, Texaco's sales representative in Spokane, testified that the principal competition faced by the Plaintiffs was that of the Dompier-supplied stations. He also testified that the Plaintiffs could not profitably operate as low price, self-service stations while paying the RTW price. (RT 2907-2908, 1626, 1636-1637)

14. According to Texaco's representative in charge of the Dompier account, Mr. Robert Vogelman, the distributor margin of .0365¢ per gallon under the retail tankwagon price "would categorically allow our Distributor [John Dompier Oil Company] a retail marketing advantage over our present contract retailer and investment retailers with which they cannot compete." (Ex. 215)

15. There was testimony from Plaintiffs of complaints that they had from customers

concerning their pricing and the pricing at the stations operated and supplied by the John Dompier Oil Company. (RT 530-531, 238, 243, 315, 401, 530, 600-601, 657-658, 1558, 1290, 732-733)

16. The Plaintiffs testified that they saw customers of theirs in gasoline stations operated and supplied by the John Dompier Oil Company and Gull, and found credit card receipts from other stations in cars they were servicing. (RT 249, 316, 1558, 1244-1245)

17. Mr. Harper, one of Texaco's expert witnesses, testified about reasons why a Dompier station could sell 70,000 gallons per month while a Plaintiff's station on the same street a short distance away sold only 20,000 gallons. He admitted that other than their different buying prices, there were no differences between the two stations except that the Dompier station

had a canopy and the Plaintiff may have occasionally had dirty hands from doing service work. (RT 2278-2315, Exs. 920, 921,922A, B and C)

II. EVIDENCE OF COMPETITION FOR RETAIL SALES.

1. Prior to 1973, Texaco created price zones to show stations which competed directly with each other, and on the basis of which price changes to meet competitive situations were made. (Exs. 27 and 794; RT 1436-1442) Several Plaintiffs' stations were located in or adjacent to price zones which included stations supplied by or operated by the John Dompier Oil Company and the Gull Oil Company. (Exs. 27, 794; RT 798, 805-806, 1436-1442)

2. Mr. Victor, Vice President of Gull, testified that Texaco's price zones were smaller than those used by Gull because

Gull believed that its competitive area was larger than the area defined by Texaco price zones. (RT 703) Mr. Victor said that the market for gasoline in Spokane was the metropolitan area because people were able to drive around the area easily. (RT 703-704, 709)

3. Andy Evans, Texaco's sales representative in Spokane, testified that the price zones were too small and did not include all of the competition experienced by Texaco outlets. He recommended that the size of some price zones in Spokane be increased because they did not reflect the actual competition between stations. (RT 1642-1643)

4. Several of Texaco's price zones in Spokane included stations which were seven to twelve miles apart because these stations competed with each other. The price zone west of Spokane which included

Mr. Cliff Robinson's station, 8 miles from the downtown Spokane area, merged with the traffic pattern in the downtown price zone. (RT 804-806, 1436-1442; Exs. 27, 794)

5. Texaco's Vice President testified that there was considerable "intrabrand competition" within the Texaco brand. (Ex. 1)

6. Numerous customers testified to the competition between Plaintiffs and Dompier stations. (<u>See</u> Section IV(B), <u>infra</u>.)

III. EVIDENCE OF TIGHT PROFIT MARGINS AND STRONG COMPETITION.

1. Neil Dompier testified that any retailer who could not keep his retail price down with him was not considered a competitor by him. To be a competitor of his, a dealer needed a low enough buying price to meet his price and made a profit.

(RT 838-839) In 1975, if Dompier posted a retail price equal to Plaintiffs' purchase price from Texaco (RTW), he would make approximately .04¢ per gallon. (RT 796, 810)

2. Mr. Victor of Gull Oil testified that if he could not keep his price within .01¢ of the majors, he would lose a substantial volume of his business. (RT 704-705)

3. Mr. Victor testified that a 1¢ price difference at retail would cause a substantial loss of business in the gasoline market during the relevant time period. (RT 703-704)

4. Mr. Victor testified that Dompier was an aggressive marketer in the Spokane area. By aggressive marketer he meant that the stations tried to price below their competition in the immediate surrounding area and were generally

pricing below the prevailing major price in the area where they competed. Gull considered every station in Spokane to be part of its competition. (RT 704-709)

5. The retail gasoline market in Spokane was characterized by strong competition and low profit margins. (RT 799, 810, 1114-1116, 1124-1125, 704-705, 708-709; Exs. 215, 202) Except in the most unusual circumstances, a station's retail gasoline price was the most important factor to its success. (RT 1114-1116, 705, 837, 838, 1391-1395) Gasoline prices also affected other aspects of a retail dealer's business. For example, Texaco's dealer training manual stated that the amount of a station's sales of tires, batteries, accessories and "backroom" repair work depends upon the amount of gasoline it sells. (Ex. 201 at 8-1, 8-2; RT 1500-1502)

6. Mr. Dompier testified that because the Plaintiffs purchased their gasoline for more than Mr. Dompier from Texaco, Plaintiffs would not be able to maintain a retail price competitive with his retail price. (RT 837-848)

IV. TEXACO'S KNOWLEDGE OF DIRECT LOST SALES CAUSED BY THE PRICE DISCRIMINATION

1. Texaco's Long-Range Plan, prepared by Vice President William Fisher, stated that the competition from wholesaler-supplied and -operated stations was causing a loss of sales by the independent retailer class of trade. (Ex. 202) Both Dompier and Gull were considered Texaco wholesalers.

2. Texaco observed that the practice by Texaco distributors of passing on to their customers the discount granted by Texaco was creating severe problems for Texaco's lessee dealers who also were paying a

gallonage rental to Texaco in addition to retail tankwagon. (Ex. 202)

3. Texaco's Senior Vice President, Mr. William Kinnear, said that distributors were obtaining business from Texaco's independent retailers and that the increase in sales by the distributors could be traced almost entirely to the magnitude of the distributor discount and the abuse of the hauling allowance. (Ex. 1; RT 2072-2073)

4. Texaco's regional managers were of the opinion in 1976 that there was a "rampant and alarming increase in distributor gasoline volume" and a "sales imbalance . . . developing among various classes of trade." (Ex. 2)

5. Mr. Fisher, Texaco's Vice President in charge of pricing, testified that he believed that the "root cause" of the ram-

pant and alarming increase in distributors' gasoline volume was the distributor price. (RT 1415-1416)

6. Texaco's Long Range Plan (Ex. 202), prepared by the Vice President in charge of pricing, William Fisher, observed that retail pricing practices of its wholesalers (i.e., Dompier and Gull) was causing direct-supplied retailers problems in staying competitive.

V. TESTIMONY OF THIRD PARTY WITNESSES (CUSTOMERS) RE DIVERTED SHARES

Numerous customers of the Plaintiffs in the Spokane market testified that they changed their buying practices from Plaintiffs' stations to stations operated and supplied by the John Dompier Oil Company because of the difference in price charged for Texaco gasoline at the pump. The evidence was that the difference in the retail price was generally between .02¢

and .05¢ per gallon. Customers of the Plaintiffs testified that their driving routes took them virtually all over the Spokane market and in many instances they would pass more than one favored purchaser's station and observe the lower prices at more than one favored purchaser's station.

(a) Leo Green (customer of Plaintiff Vince Lies). During the 1970s, Mr. Green was in the produce business operating a fleet of eight vehicles delivering produce throughout Spokane. Mr. Green initially utilized Mr. Lies for his gasoline sales for the business, spending approximately $1,000.00 per month for his gasoline and service requirements. (RT 470-474, 481-482) In the mid-1970s, Mr. Green discussed with Mr. Lies the difference in the retail price between Lies' station and the Dompier-supplied and operated Texaco

stations in Spokane. (RT 477-479) Mr. Lies told Green that he was operating on a .02¢ margin on his gasoline. (RT 478) The difference between Lies' retail price and the price at the Dompier Monroe Street station was .03¢ to .05¢. (RT 479) He did not have to pump his own gas at the Dompier Monroe Street station. (RT 480) He began to purchase more gasoline at the Dompier Monroe Street station than from Vince Lies because of the price difference.

(b) Ron Hardin (customer of Plaintiff Hank Rigg). During the 1970s, Mr. Hardin traveled generally eight to nine miles per day to work traveling from the north side of Spokane to the south side. (RT 633) Mr. Hardin initially purchased his gasoline from Hank Rigg. (RT 634) Approximately 90 percent of his gasoline purchases were made utilizing the Texaco

credit card. (RT 635) During the damage period, Mr. Hardin noticed that the retail prices at the Dompier Monroe Street, Freya Street and Third Avenue stations were .03¢ to .04¢ less than the prices at Hank Rigg's station. (RT 647-648) The Dompier Texaco stations were on the same traffic pattern that Mr. Hardin utilized to commute to and from work. (RT 637) He drove by the North Monroe Dompier station daily to and from work. (RT 638) He did not trade with the independents because he used his Texaco credit card most of the time. (RT 638-639) He did not have to pump his own gas at the Dompier Monroe or Third Avenue stations and still received the lower retail price. (RT 637-638) After he noticed the difference in the price between Rigg's station and the other Dompier stations in the market, he began to trade with the Dompier stations 75% of the time (RT 637) due to a .03¢ to .04¢

savings per gallon at the pump. (RT 639-40) Mr. Hardin discussed the retail price at the other Dompier stations with Mr. Rigg. (RT 640)

(c) Lt. Gene McGougan (customer of Plaintiff Jim Sills). As a Spokane City police officer, Lt. McGougan traveled most traffic routes in the Spokane area in the early 1970s. (RT 1534-1535) Lt. McGougan lived on the north side of Spokane and initially purchased most of his gasoline from Texaco, utilizing his Texaco credit card 98-100% of the time. (RT 1535-1536) In the early 1970s his family utilized three cars (RT 1537) and traded with Mr. Sills. He began to trade with the Dompier North Monroe station after he noticed a difference in the retail price between Sills and Dompier (RT 1537-1538), and by 1976 he was trading with the Dompier North Monroe station 80-90% of the time. (RT 1539)

(d) Mike James (customer of Plaintiff Al Allen). Mr. James was the former son-in-law of Al Allen, and worked at Mr. Allen's station for 11 months in 1974. (RT 1585) He traded with Mr. Allen while he was employed there. (RT 1586) After leaving Mr. Allen, he was a manager of Midas Muffler in Spokane and commuted between his home and two different Midas stores in Spokane. (RT 1586) He observed that the difference in the retail price between Mr. Allen and the two Dompier stations on Monroe and Market Streets was .05¢ (RT 1587-1588), and he began to trade at the Dompier North Market and Monroe Street Texaco stations. (RT 1586-1589) When he purchased product from Mr. Allen, it was at his self-service island (RT 1587), and when he purchased product from Dompier, it was attendant served. (RT 1589) Mr. James was purchasing one to two gas fill-ups per week. (RT 1592) He did not

generally trade with independent-branded stations (RT 1588), due to his brand loyalty to Texaco.

(e) <u>Robert Town (customer of Plaintiff Alva Blue)</u>. Mr. Town was a retired employee from Crystal Linen Supply Company in Spokane. (RT 1594) Mr. Town initially traded with Mr. Blue for his gasoline needs, purchasing ten to twelve gallons of gas per week. His home was located in the neighborhood near Mr. Blue's station, but he began to go out of his way to buy Texaco gasoline at the North Monroe station which was 20 blocks from his home because of the difference in price. (RT 1595-1596) He observed that the difference in the retail price between Mr. Blue and the Dompier North Monroe station was .03¢ and .04¢ during the 1970s. He began to trade with the Dompier North Monroe station as a consequence of

the difference in the retail price and quit dealing with Mr. Blue. (RT 1596-1597)

(f) <u>Ernie Rouse (customer of Plaintiff Hank Rigg)</u>. During the 1970s, Mr. Rouse was the owner of the Spokane Cash Register Company located on North Monroe. He operated a fleet of six to eight vehicles during 1972 to 1981 for delivery purposes and purchased gasoline from Mr. Hank Rigg, also located on North Monroe. (RT 1600-1601) He utilized a Texaco credit card. (RT 1602) He estimated that two to three vehicles would purchase full tanks of gasoline every day. (RT 1602) While he was trading with Mr. Rigg, he began to observe a difference in the retail price at Rigg's station versus Dompier's North Monroe Street station. (RT 1602-1603) He observed the difference in the retail price was approximately

.04¢. The difference in the retail price caused him to quit doing business with Hank Rigg and to begin buying gasoline at the Dompier North Monroe station. (RT 1603-1605) After he left Mr. Rigg for his gasoline business, he was embarrassed to deal with him only for service work on his vehicles so he began to utilize other dealers for service work as well. (RT 1605) He encouraged his drivers to look for low retail prices. (RT 1609)

(g) John Moritz (customer of Plaintiff John Bevan). Mr. Moritz was a pharmaceutical salesman for Burroughs Pharmaceutical during the 1970s. From 1964 up until the early 1970s, he primarily purchased gas from John Bevan's Texaco station on North Wall and his station on Third and Lincoln. (RT 1154) He began to purchase his product from the Dompier East Third station because of the lower retail

price. (RT 1155) He observed a .03¢ to .04¢ difference in the retail price between Bevan and Dompier. (RT 1156) He received pressure from Burroughs to buy at the lower retail price. (RT 1155) Moritz had developed Texaco brand loyalty and did not purchase from independent non-branded stations. (RT 1156) Approximately 90% of his business ended up with the Monroe Street or Third Avenue stations. (RT 1157)

(h) Eva Walch (customer of Plaintiff Gene Robinson). Mrs. Walch lived in the Hillyard section of Spokane (RT 1169) and worked at a downtown department store, The Bon Marche. (RT 1170) In the early 1970s, she purchased approximately 90% of her gasoline from Mr. Robinson on North Market. (RT 1171) After that, she began to buy gas from the Dompier North Market station. (RT 1171) She rarely purchased

her gasoline needs from independent stations. (RT 1171) She observed that the difference in the retail price between Robinson's Texaco station and the Dompier North Market station was .07¢ and .08¢ per gallon. (RT 1172) She stopped trading with Mr. Robinson completely as a consequence. (RT 1172-1173) She received service work from the Dompier North Monroe station as well as gasoline. (RT 1174)

(i) Rod Scroggin (customer of Plaintiff Ralph Webber). Mr. Scroggin was a teacher at Gonzaga Prep High School in Spokane and also operated a dental/biological lab on North Hamilton Street near Ralph Webber's Texaco station. (RT 1328-1329) Mr. Scroggin made deliveries to dentists located throughout Spokane and utilized a Texaco credit card for his business use. (RT 1329) He traded with Mr. Webber almost exclusively until he began to

observe other Texaco stations with lower retail prices than Mr. Webber. (RT 1330-1331) This included the Red Carpet Division Street station, the Dompier Monroe Street station and the Dompier Market Street station. (RT 1330-1331) He observed the difference in the retail price was .03¢ to .04¢ per gallon. During this time period, he was purchasing two tanks per week (20 gallons each). As a consequence of the difference in the retail price, he quit trading with Mr. Webber (RT 1331-1332), and purchased gasoline from Dompier's North Market station, North Monroe station and Mission Avenue station. (RT 1332)

(j) Myrtle Mottaz (customer of Plaintiff Al Allen). Mrs. Mottaz purchased almost all of her gasoline utilizing a Texaco credit card from Mr. Allen on Northwest Boulevard at his self-service island until

she observed a difference in the retail price between Mr. Allen and Dompier's North Monroe Street station. (RT 1344-1345) She observed that the difference in the retail price was between .03¢ to .04¢ per gallon. This caused her to quit buying gasoline from Mr. Allen and begin to trade with the Dompier Monroe Street station. (RT 1345-1346) The gasoline at the North Monroe Street station was attendant-served. (RT 1346) She traveled nine extra blocks in order to trade with the Dompier station. (RT 1347)

(k) Gary Corkins (customer of Plaintiff Al Allen). Mr. Corkins is a mechanic for Johnson Trailer Sales located in the Spokane Valley. He resides in the northwest section of Spokane and commuted 24 miles a day to work. (RT 1352-1353) He initially purchased his gasoline from Mr. Al Allen at the self-service island.

(RT 1354-1355) He began to observe that there was a difference in the retail price between Al Allen's self-service island and the Dompier Monroe Street station. He quit trading with Mr. Allen (RT 1354) and began to trade with the Dompier station on North Monroe where the product was attendant-served because of the retail price difference. (RT 1355) He also purchased gas from Dompier's Freya Street station and the Market Street station. (RT 1360-1361)

APPENDIX B

APPENDIX B

Plaintiff's Exhibit 1

March 5, 1976

Mr. Gorman C. Smith
Assistant Administrator
Office of Regulatory Programs
Federal Energy Administration
2000 M Street, N.W.
Washington, D. C. 20508

Dear Sir

On February 27th, I met with Douglas G. Robinson, Deputy General Counsel, and other FEA representatives to discuss in some detail certain trends which have arisen in our marketing of gasoline over the last several years. Mr. Robinson suggested that I reduce to writing the points we discussed and submit them to you for your information and consideration.

Over the last several years, the volume of gasoline we sell to Texaco distributors has increased at a dramatic

rate, while the volume sold to directly supplied retailers has suffered an equally dramatic decrease. For example, several Texaco distributors showed an increase of over 300% in gasoline purchases in 1975 as compared to 1972. In fact, in just one year, the average increase in the volume purchased by 28 of Texaco's largest distributors was 32% and the average increase for all distributors was over 13%. During the same period, the volume of gasoline sold to independent retailers decreased approximately 10%. This decrease was more than offset by the increase in purchases by distributors. In fact, since 1972, Texaco has experienced a 16% increase in our total adjusted base period volumes for all classes of trade.

These trends create a severe problem for us and Texaco retailers. The economic viability of many thousands of independent

retailers has been severely strained by this decrease in their gasoline sales. Moreover, Texaco is a net purchaser of gasoline and it is becoming uneconomical for us to continue to provide unlimited supplies of gasoline to all our customers.

We believe this problem can be traced to two basic factors: (1) the relative price levels to our various classes of purchasers [which cannot be changed under FEA regulations without severe penalties to our banked costs,] and (2) the practice of many distributors to accept from us a hauling allowance for gasoline which is not in fact delivered to their bulk plant. While these problems may not be unique to Texaco, their impact upon Texaco is especially severe. We market not only directly to independent Texaco retailers, but also to distributors. Unlike some companies, Texaco distributors are not

located in only those geographic areas in which we do not directly supply service stations. Rather, in many areas of the country, especially urban, we sell our branded gasoline both to independent retailers and independent distributors who, in turn, resell to independent retailers. As a result, there is considerable "intra-brand" competition in Texaco gasoline. [It is ironic that current FEA regulations operate to unfairly favor the distributor over the retailer in these situations.]

For many years, we have sold gasoline to distributors at a discount of approximately 3-1/2¢ per gallon from the price charged our independent retailers. This discount was traditionally justified by the many important services distributors performed when they physically "distributed" this gasoline among many

customers, most of whom required small volume deliveries. These traditional functions continue to be performed by most of our distributors operating in rural areas, who serve various farm and other small volume accounts including service stations. Accordingly, their existing margin is appropriate on both a competitive and functional basis. On the other hand urban distributors have significantly changed their methods of operation over the past few years, particularly since the advent of the gasoline shortage several years ago. These distributors are shedding many of their traditional functions and have concentrated their sales in very high volume outlets. This has reduced their per gallon overhead cost to the point where a good portion of the discount is not being utilized to defray their costs of distribution at all.

In addition to this traditional discount, many of these distributors have been obtaining added savings through the manipulation of their hauling allowance. Because our prices to distributors have traditionally been delivered prices, we are obligated to "haul" gasoline to their bulk storage facilities. Some of our large distributors own their own trucks. In those cases, they could obtain a per gallon hauling allowance based upon the ICC rate for the distance between our terminal and their bulk plant. Increasingly, however, distributors are accepting delivery at our terminal and collecting the full hauling allowance but are not taking the gasoline to their storage facility. Rather, they are transporting it only a small fraction of that distance, and delivering it direct to a retail outlet. While the amount of the hauling allowance varies with the distance to the distribu-

tor's bulk plant from our terminal facility, hauling allowances can reach several cents per gallon. This amount can provide a significant marketing advantage to a distributor when he is not, in fact, incurring the cost of hauling the gasoline to his bulk facility.

We believe that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance. We believe that they are inconsistent with the realities of gasoline marketing today. [The purpose of my discussion with Mr. Robinson was to acquaint him with these problems and to set forth the following options which might be available to help alleviate them.

1. We could increase prices to all classes of trade. Although this would decrease the total volume of our gasoline sales, it would have an adverse economic impact upon many of our independent retailers and rural distributors.

2. We could allocate product to all classes of trade. However, we consider this to be an unattractive alternative because it perpetuates the artificial relationships presently in existence, and might delay the elimination of controls, which we believe to be essential to any permanent solution to this problem.

3. Under our interpretation of current FEA regulations, we are

permitted to selectively increase the prices to certain classes of trade in certain locations in the country to insure a better competitive balance between the various segments of our business. However, this would involve our accepting a significant cost bank penalty.

4. We could change the methods of granting our hauling allowances to distributors so that they would only be paid for the distances that they actually hauled the gasoline.

None of these options involves any desire on our part to be punitive to distributors, nor does it reflect any plan to "phase out" distributors from our marketing system. In fact, as we mentioned to Mr. Robinson, we propose to

offer distributors a multi-year contract which will provide for a continuing relationship with them.

While no definitive solution emerged from our meeting, I believe that both sides reached a better understanding of the considerations faced by the other, and the following avenues for potential solution did emerge:

1. The FEA representatives present indicated that they would give further thought to permitting a one-time decrease of a penny or so in the price charged our retailer classes of purchasers without requiring us to incur a cost-bank penalty.

2. A ruling can be expected within the month on the issue raised by the FEA's Regional Office in

Dallas concerning the propriety of an earlier 0.3¢ change in the discount granted our distributors. If favorable this ruling will at least permit us to make some adjustment in the distributor margin even though a cost bank penalty will be incurred.

3. Changes in the existing regulations to permit selective pricing by class and location without a cost bank penalty and the expeditious handling of a request for an interpretation of how a revision in our hauling allowance procedures might be treated under existing regulations are considered loss feasible alternatives by the FEA.

The meeting concluded with our request that immediate consideration be given to

items 1 and 2 above, so that we would be able to take steps to alleviate as soon as possible this pressing problem which adversely impacts so many of the independent branded retailers which we supply.

If you would like any elaboration of the points discussed above or if you believe a further meeting would assist you in reaching a decision on any of these matters, please let me know.]

Very truly yours,

J. W. Kinnear

JWK:llw
cc Mr. Douglas G. Robinson

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

—*vs.*—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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August 26, 1988

IN THE

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OCTOBER TERM, 1987

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REPLY BRIEF FOR PETITIONER

The briefs *amici*[1] and Petition demonstrated that the decision of the Court of Appeals creates serious, detrimental implications for the economy and the law.

Respondents, in their Brief in Opposition and their Response to *Amici*, make scant effort to defend the rule of law adopted below. Rather, their thrust is that the Ninth Circuit's basis for decision can be disregarded because plaintiffs might have pur-

1 Motions for leave to file briefs as *amici curiae* in support of the Petition have been filed by the National Association of Manufacturers, the American Petroleum Institute, the Society of Independent Gasoline Marketers of America, the National Association of Convenience Stores, the Petroleum Marketers Association of America and the National Association of Texaco Wholesalers.

sued a different tack. Plaintiffs might have chosen to focus their claim on the period after Dompier, the wholesaler, acquired its first retailer and on competition between plaintiffs and stations operated by Dompier (as opposed to stations operated by independent retailers who purchased from Dompier in its capacity as pure wholesaler).

But plaintiffs did not so confine their claims; they did the opposite. They took the position there was no legal difference between competition with independent retailers purchasing from Dompier and with Dompier's own salary-operated stations (*e.g.*, B-6 n.6). They took the position there was no legal difference between the period Dompier was nothing but a wholesaler and the period it was more. They declined to differentiate between these periods and declined to permit the jury to do so, stipulating that if they are wrong and there is a legal difference, they will suffer the consequences.[2]

Accordingly, the Court of Appeals had no alternative but to confront the question it addressed of the legality of selling to wholesalers at lower prices than retailers. And, needless to say, it is this Court's practice to "decide the case as it was framed by the Court of Appeals." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. ____, ____ n.2, 108 S.Ct. 1931, 1936 n. 2 (1988).[3]

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2 The Petition noted:

"Thirty months into the damage period, Dompier, in addition to being a wholesaler, acquired its first retail service station and then over the years acquired a few others (B-4 n.4), continuing to act as a pure wholesaler to twelve independent retailers (ER 34-35). Plaintiffs did not distinguish between these two periods, conceding that if it was lawful for Texaco to sell to Dompier at the price charged all wholesalers during the thirty month period in which Dompier was nothing but a wholesaler, judgment must be for Texaco. (ER 529-30)." Petition at 4 n.3.

This is not disputed by the Brief in Opposition.

3 As is clear from the opinion of the Court of Appeals, Texaco preserved the issues raised by the Petition and that court was abundantly aware of Texaco's position on those issues.

It is of exceptional national importance that the writ issue and the rules announced by the Court of Appeals, which even respondents are reluctant to defend, be corrected.

Dated: August 26, 1988

Respectfully submitted,

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No. 87-2048

In the Supreme Court of the United States

OCTOBER TERM, 1988

TEXACO INC., PETITIONER

v.

RICKY HASBROUCK, DBA RICK'S TEXACO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a supplier that offers uniform prices to purchasers at the same level of the distribution chain may be liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), if the supplier is aware that an independent wholesaler passes on to retailers a portion of the discount that it receives from the supplier, thereby undercutting the price that the supplier offers directly to retailers and placing the supplier's retailer customers at a competitive disadvantage.

2. Whether the court of appeals erred in concluding that the plaintiffs demonstrated "injury to competition" within the meaning of the Robinson-Patman Act.

3. Whether the jury's damage award in this case conflicts with this Court's holding in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), that plaintiffs in a Robinson-Patman Act case are not entitled to minimum or "automatic" damages in the amount of any unlawful price discrimination.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Texaco Inc. sold gasoline and other petroleum products in the Spokane, Washington, area until 1981. Respondents are 12 individuals (or their successors in interest) who, at various times during the period relevant to this litigation, operated automotive filling stations in Spokane that sold gasoline at retail under the Texaco brand name.

Texaco sold gasoline directly to respondents at a delivered "retail tank wagon" (RTW) price. It sold the same gasoline to at least two other firms in Spokane—the Dompier Oil Company and the Gull Oil Company—at a lower price, under distributor contracts providing for a fixed discount relative to the RTW price. Gull, as an "unbranded distributor" selling gasoline under its own trade name, received a greater discount than Dompier, which sold the gasoline under the Texaco brand name. Both

companies sold at least some gasoline to stations that they neither owned nor controlled.

2. a. In January 1976, respondents filed suit in the United States District Court for the Eastern District of Washington. The complaint, as amended, alleged that Dompier and Gull competed with respondents "in the sale of gasoline motor fuels," and that petitioner's sale of gasoline to Dompier and Gull at lower prices than those charged respondents for gasoline of "like kind and quality" tended to lessen substantially the competition between respondents and Dompier, Gull, and the stations that Dompier and Gull supplied, in violation of Section 2(a) of the Robinson-Patman Anti-Discrimination Act (Robinson-Patman Act), 15 U.S.C. 13(a). C.A. E.R. 13-14.

The case was tried over a four-week period in late 1979. The jury rendered a verdict in favor of each respondent on the Robinson-Patman Act claim and awarded damages totaling $849,484 before trebling. Petitioner moved for judgment notwithstanding the verdict challenging, among other things, the court's instructions on damages. The district court granted the motion because it concluded that the damage theory under which the case had been submitted to the jury was no longer valid. While respondents' appeal from that judgment was pending, this Court addressed the damages issue in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). This Court rejected the notion that plaintiffs in a Robinson-Patman Act case are entitled to "automatic damages" equal to the amount of an illegal price discrimination. The court of appeals then held that respondents were entitled to attempt to prove damages under a theory consistent with *J. Truett Payne*, and it remanded the case for a new trial on both liability and damages. *Hasbrouck* v. *Texaco, Inc.*, 663 F.2d 930 (9th Cir. 1981), cert. denied, 459 U.S. 828 (1982).

b. The case was tried again in June 1985. The parties stipulated that petitioner charged Dompier and Gull prices that were lower by specified amounts than the RTW prices that petitioner charged respondents. See C.A. E. R. 33-34. There was extensive testimonial and documentary evidence tending to establish that

the stations owned or supplied by Dompier often posted *retail* prices that were barely, if at all, higher than the *wholesale* (RTW) price that petitioner charged respondents for their gasoline.[1] In addition, a number of respondents testified about complaints they received from customers concerning the difference between their retail prices and the prices charged by the stations owned or supplied by Dompier.[2]

Respondents also introduced evidence establishing that they had complained repeatedly to petitioner about its pricing policies, and that petitioner was aware that the discount offered to Dompier and Gull conferred a competitive advantage on stations owned or supplied by those companies. Respondents argued that the wholesale services allegedly performed by Dompier were nonexistent or de minimis and were, in any event, fully covered by a "hauling allowance" that petitioner granted Dompier in addition to its discount. Finally, there was evidence that Dompier's purchases of gasoline from petitioner increased substantially during the period in question while respondents' purchases decreased. Respondents presented several different damage estimates based on differing assumptions as to how petitioner might have eliminated the challenged price difference.

Petitioner argued that the lower prices to Dompier and Gull were "functional discounts" reflecting various wholesale services Dompier and Gull performed. Petitioner also urged that respondents had failed to demonstrate that the challenged price differences caused any harm to competition because (1) petitioner did not control the price at which Dompier or Gull resold gasoline at either the wholesale level or the retail level; (2) re-

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[1] See, *e.g.*, Tr. 243, 315, 400, 493, 600, 640. Respondents introduced evidence pertaining to both Dompier and Gull, but the majority of their case focused on the effect of the challenged discount on their ability to compete with stations that dealt with Dompier.

[2] See, *e.g.*, Tr. 238, 243, 249, 401, 600-601. Several former customers of particular respondents testified that they started purchasing some or all of their gas from the Dompier stations instead of respondents because of these retail price differences. See, *e.g.*, Tr. 480, 639-640, 1537-1539, 1586-1589, 1596-1597.

spondents were not in substantial competition with Dompier, Gull, or any of the stations they owned, operated, or supplied; and (3) factors other than the discounts to Dompier and Gull were responsible for respondents' lost sales.[3]

The jury found for each respondent and awarded damages totaling $449,900 before trebling.

c. The district court denied petitioner's motions for a new trial and for judgment notwithstanding the verdict. Pet. App. B1-B17. In rejecting petitioner's motion for judgment notwithstanding the verdict, the court acknowledged that functional discounts generally do not trigger Robinson-Patman Act liability. *Id.* at B3. In its view, however, the evidence demonstrated that petitioner's discounts provided to Dompier and Gull adversely affected competition because the discount was not offset by Dompier's and Gull's costs and was passed along to retail competitors of respondents. *Id.* at B4-B6. The district court also held that the evidence demonstrated competitive injury and antitrust injury, as required by *J. Truett Payne*. The court noted that respondents not only had established the existence of substantial price discrimination over time, but also had proved that sales were diverted. *Id.* at B6-B9. In rejecting petitioner's motion for a new trial, the district court explained that, contrary to petitioner's contention, respondents had not based their proof of damages on the assumption that elimination of the price differential would require lowering the price they paid. Rather, respondents had presented evidence concerning several different ways in which the differential could be eliminated. *Id.* at B10-B15.

3. The court of appeals affirmed. Pet. App. A1-A20. It rejected petitioner's arguments that the Robinson-Patman Act requires only that all customers in a given functional class be

[3] Petitioner also sought to establish that its discounts were lawful under the "cost justification" and "meeting competition" provisos of Section 2(a) and (b), 15 U.S.C. 13(a) and (b). The district court, however, excluded the evidence on which petitioner primarily based its cost justification defense (Tr. 2871) and refused to submit the issue to the jury. The jury was instructed on petitioner's meeting competition defense.

treated equally and that any harm respondents suffered because Dompier "passed through" its discount to the stations that it supplied in its wholesale capacity could not support a finding of Robinson-Patman Act liability. *Id.* at A7-A10. The court of appeals agreed that the Robinson-Patman Act allows "[m]anufacturers * * * to use price differentials, commonly known as wholesale or functional discounts" and that "goods may generally be sold to wholesalers at a lower price than that charged to retailers." *Id.* at A7. Nonetheless, the court concluded, citing this Court's decisions in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), and *Falls City Industries* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), that "there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers." Pet. App. A8. Thus, the court stated, there could be a violation if the discount was not cost based and if the discount was "passed on" to stations that Dompier and Gull supplied. The court found "ample evidence" in the record to show such a violation (*ibid.*).[4]

The court of appeals also rejected petitioner's contention that respondents had failed to demonstrate the requisite injury to competition. Pet. App. A10-A12. In the court's view, the evidence established that the challenged discrimination was "substantial and * * * in effect for several years," and was thus sufficient to permit the jury to conclude that "competition may have been harmed." *Id.* at A12. Moreover, the court noted, respond-

[4] The court noted that respondents had introduced evidence that the wholesale "services performed by Gull and Dompier were insubstantial." Pet. App. A8. The court also agreed with the district court that petitioner "made 'no serious attempt' to provide a quantitative justification" for the discounts. *Ibid.* The court also pointed to evidence that "some retail stations operated or supplied by Dompier and Gull purchased gasoline at prices lower than those paid by" respondents, as well as evidence that "service stations operated or supplied by Dompier often sold gasoline at retail prices that were only two to three cents higher than the price" respondents paid petitioner, concluding that respondents had established that "some portion of the discount was passed along." *Id.* at A9.

ents also presented "direct evidence of displaced sales," which was "probative of the fact that the unwarranted price advantages which some Gull- and Dompier-supplied retailers received had a deleterious effect upon the market." *Id.* at A11-A12.[5]

Finally, the court rejected petitioner's argument, based on *J. Truett Payne,* that the jury should have been instructed that the essence of a Robinson-Patman Act violation is not that the disfavored purchaser has been "overcharged," but instead that the favored purchaser has been "undercharged." The court held that the district court's instructions on damages were sufficient to ensure that the jury did not proceed on a forbidden "overcharge" theory and that the court was not required to "use the exact words requested" by petitioner. Pet. App. A19. As the court of appeals saw it, the jury was entitled to "determine what [respondents'] sales and profits would have been in the absence of price discrimination," and "such a determination necessarily entails postulating the elimination of the price differential, either by increasing the favored buyer's price, decreasing the disfavored buyer's price, or a combination of the two." *Id.* at A16.

DISCUSSION

We are troubled by the court of appeals' discussion of a supplier's liability under the Robinson-Patman Act when an independent wholesaler undercuts the supplier's price to retailers and a jury concludes that the wholesaler's discount was not "cost based." We are mindful, however, that "[t]his Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297 (1956). On that basis, we do not believe that this case merits review. We do not believe that the case necessarily stands for the proposition that a supplier must undertake affirmatively to monitor the costs and pricing policies

[5] Specifically, the court noted that there was testimony that respondents "lost customers and sales directly to Dompier and Gull stations, that the customer switches resulted from the difference in retail prices between the stations, and that [respondents] would have recovered these lost revenues had they received as little as a two or three cents per gallon discount and been able to reduce their pump prices commensurately." Pet. App. A12.

of wholesalers to which it offers a functional discount, as petitioner contends. Rather, the jury was required to find that petitioner had actual knowledge that the discount it offered was resulting in competitive injury to its retailer customers. Moreover, we are not convinced that the theory articulated by the court of appeals would often provide a basis for damage recoveries, because suppliers will seldom find it profitable to offer a discount that results in competitive injury to their own retailer customers. In any event, it is not clear that the issue petitioner raises plays more than a minor role even in this case because the jury could have viewed the favored purchasers – Dompier and Gull – as retailers in competition with respondents rather than as independent wholesalers.[6]

[6] We confine our discussion in text to petitioner's first and broadest contention, that the differing prices charged to respondents and to Dompier and Gull should not have been subjected to Robinson-Patman Act scrutiny at all because Dompier and Gull were wholesalers and respondents were retailers. The other two issues that petitioner raises do not warrant this Court's review in our opinion. Petitioner contends that the court of appeals allowed the jury to infer the requisite injury to competition from the fact that petitioner charged "wholesalers [a] lower [price] than * * * retailers" (Pet. 13) and, in so doing, adopted a per se rule of illegality. In *FTC* v. *Morton Salt Co.,* 334 U.S. 37 (1948), this Court held that a persistent and substantial price discrimination could give rise to an inference of injury sufficient to support a prima facie case under the Robinson-Patman Act. The district court's instruction to the jury was an accurate statement of the law in that it allowed – but did not require – the jury to draw an inference of injury to competition from the fact that there was discrimination in price that was "substantial" in terms of amount, quantity, and duration. Tr. 3337. Moreover, petitioner did not object to the district court's instructions on this basis, did not raise the point in the court of appeals, and even now points to no specific error in the instructions. Accordingly, petitioner is not in a position to raise the issue. See Fed. R. Civ. P. 51. In any event, there was substantial evidence of actual injury to respondents in the form of displaced sales.

Petitioner's contention that the decision below conflicts with this Court's decision in *J. Truett Payne* is similarly without merit. In *J. Truett Payne* the Court rejected a theory of "automatic damages" equal to the difference in price and held that a plaintiff may recover damages only for the type of injury the Robinson-Patman Act was intended to prevent. See 451 U.S. at 562-563. In this case, respondents claimed that their sales and profits were reduced, and the jury was provided with a variety of damage studies, some of which were

1. We do not agree with the court of appeals' formulation of the applicable legal standard in this case. The court stated that a supplier that sells at uniform prices to purchasers at the same "functional" level in the distribution chain nonetheless may be liable under the Robinson-Patman Act if the discount afforded to a particular independent wholesaler is not "cost-based" and if the wholesaler passes on a portion of that discount to firms that compete with other customers of the supplier. Pet. App. A8. Although that formulation finds support in one old case (*Standard Oil Co.* v. *FTC*, 173 F.2d 210 (7th Cir. 1949), rev'd on other grounds, 340 U.S. 231 (1951)), and is not inconsistent with the words of the statute,[7] it is not a construction that this Court has ever adopted. In particular, language in *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), that might be read to support the court of appeals' formulation need not be so read in light of the facts of that case. The favored purchaser in *Perkins* owned, through a chain of subsidiaries, a direct competitor of the disfavored purchaser. Thus, liability could have been predicated on the failure of the supplier to offer the disfavored purchaser the same price it offered other purchasers operating at the same functional level. 395 U.S. at 651 (Marshall, J., concurring in part and dissenting in part).[8]

premised on the assumption that the price respondents paid would have been reduced. Nothing in *J. Truett Payne*, however, precludes the jury from concluding that the price discrimination in this case might have been eliminated by reducing the price that respondents paid, and from computing damages based on the additional sales and profits that would have followed if this assumption were true. Thus, the district court (Pet. App. B14) and the court of appeals (*id.* at A15-A17) correctly rejected the argument that *J. Truett Payne* foreclosed the jury from awarding damages based on the assumption that petitioner might have lowered its prices to respondents.

[7] The statute prohibits price discrimination that may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. 13(a).

[8] The Court in *Perkins* also may have viewed the disfavored purchaser as being a wholesaler itself. See 395 U.S. at 644.

In our view, allowing liability to be imposed on the supplier when the disparity in the prices available to firms at the same functional level comes into being only as a result of the intervening pricing decision of an independent firm would, in general, extend the statute beyond the reach intended by Congress.[9] The Robinson-Patman Act was intended generally to prevent competitive injury that may arise when suppliers charge different prices to customers at the same functional level. See, *e.g.*, *Abbott Laboratories* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1, 12 (1976). It is true that the favored and disfavored purchaser need not actually compete for a violation to occur. For example, a violation may arise if the supplier discriminates in price among wholesalers that do not compete with each other but whose retailer customers do compete. See *Falls City Industries* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983).[10] In that situation, however, the supplier has itself created the disparity between the prices paid by purchasers at the same functional level. Although intervening market forces may eliminate the disparity in prices downstream, the supplier has reason to anticipate that, so long as retailers in the disfavored channel of distribution are unable to purchase from wholesalers in the favored channel, the disparity it has created may persist.

A rule broadly subjecting suppliers to the threat of damage liability if an independent wholesaler elects to undercut the supplier's price to retailers—and if a jury later concludes that the wholesale discount was not cost based—would represent a significant extension of the law. Under such a rule, a supplier could protect itself from liability only by eliminating the func-

[9] We do not suggest that the requirements of the Act may be circumvented by means of a dummy wholesaler, controlled by the supplier or one or more purchasers. In that situation, the dummy firm's customers should be deemed the customers of the supplier for purposes of the Act. Cf. *Purolator Prods., Inc.* v. *FTC*, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); *General Auto Supplies, Inc.* v. *FTC*, 346 F.2d 311 (7th Cir.), cert. dismissed, 382 U.S. 923 (1965); 5 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 36.03[2] (1989).

[10] In *Falls City*, the wholesale purchasers were precluded by state law from competing with each other.

tional discount or by attempting to tailor the discount precisely to the costs and pricing strategies of each individual wholesaler. The former alternative would eliminate the ability of most independent wholesalers to compete with the supplier and thus would be tantamount to outlawing systems of dual distribution.

The latter alternative is probably impossible, since it would require the supplier to obtain data about the costs and pricing strategies of the wholesalers with which the supplier competes for retail sales. Even if it were possible to obtain such data, this strategy would still entail administrative burdens that could impede development of efficient pricing systems. Cf. *Falls City*, 460 U.S. at 449 (a requirement that the "meeting competition" defense be applied on a customer-by-customer basis might make meaningful price competition unrealistically expensive). For example, if the supplier did somehow obtain the necessary data and attempted to tailor the functional discount to each individual wholesaler, it would risk liability for discriminating among wholesalers if it failed to calibrate the discount precisely and thereby caused competitive injury to a wholesaler.

Moreover, suppliers' efforts to avoid liability could penalize efficiency and discourage price competition. The wholesalers most likely to have their discounts reduced or eliminated by suppliers fearful of liability under the Act would be the ones with the lowest distribution costs and the most aggressively competitive pricing policies.[11] Thus, such a construction of the Act

[11] Accordingly, commentators have generally criticized the approach that was adopted by the Federal Trade Commission (FTC) and the Seventh Circuit in the old *Standard Oil* litigation and now appears to have been endorsed by the court of appeals in this case. See, *e.g.*, F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 196-205 (1962) (criticizing *Standard Oil* and arguing that "any lower price in favor of a distributor always creates a capacity to 'pass it on' and underprice the supplier (or other distributors) in resales to the 'retailer' level") (emphasis omitted); C. Edwards, *The Price Discrimination Law* 304 (1959) (noting "unavoidably awkward" consequences of holding manufacturers liable for differences in prices paid by directly supplied retailers and those who purchase through distributors); *id.* at 313 (after discussing problem in light of *Standard Oil*, noting that the "failure of the Congress to cope with the problem either by excluding it from the application of the statute or by applying a rule suited to its peculiar nature has left the [Federal Trade]

would conflict with this Court's admonitions that, whenever possible, courts should avoid interpretations of the Robinson-Patman Act that undercut the procompetitive purposes of the antitrust laws. See *Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (quoting *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 63 (1953)); *United States* v. *United States Gypsum Corp.*, 438 U.S. 422, 458 (1978).

2.a. Despite our concerns about the court of appeals' discussion of the law, we are not persuaded that this case warrants review. As an initial matter, we do not believe that the case stands as authority for the sweeping proposition that a supplier must undertake affirmatively to monitor the costs and pricing policies of each wholesaler. The district court instructed the jury that "there may be a price discrimination if a portion of that lower price was passed on to [retailers] and * * * [petitioner,] before the sale was made[,] knew that a portion of the difference would be passed on to the customers." Tr. 3336.[12] In

Commission an impossible job in this type of case"); 5 J. von Kalinowski, *supra*, §§ 31.02-31.03 (analyzing *Standard Oil* and *Perkins*, suggesting that the latter decision should be not "be given any broader scope than is justified by the unique facts which were before the Court"). See also *Report of the Attorney General's National Committee to Study the Antitrust Laws* 202-207 (1955) (criticizing *Standard Oil* on the ground that "imposing on any dual supplier a legal responsibility for the resale policies and prices of his independent distributors contradicts basic antitrust policies").

[12] There was evidence in the record to support a conclusion that petitioner had such knowledge. Virtually all respondents testified that they complained, at one time or another, to Robert Vogelman, petitioner's sales representative with responsibility for marketing in Spokane. In a letter to a Federal Energy Administration (FEA) official discussing possible modification of certain FEA regulations, James W. Kinnear, an official of petitioner, stated that large urban distributors like Dompier and Gull had "shed[ ] their traditional functions" and were thus able to reduce their "overhead cost to the point where a good portion of the discount is not being utilized to defray their costs of distribution at all." Br. in Opp. App. B5. There was also testimonial and documentary evidence tending to establish that petitioner's officials expressed great concern about "the very serious problem of rampant and alarming increases in distributor gasoline volume" (Tr. 1414), which they attributed to the ability of distributors operating retail stations to take advantage of the whole-

denying petitioner's motion for judgment NOV, the district court observed that a legitimate functional discount should be "reasonably related" to the expenses assumed by the favored purchaser, but it expressly declined to require suppliers to tailor each purchaser's discount precisely to its individual costs and pricing practices. To the contrary, it emphasized that "a precise accounting of the value of the performed functions is not mandated." Pet. App. B5.[13] The court of appeals, citing *Perkins* v. *Standard Oil Co.*, *supra*, and *Standard Oil Co.* v. *FTC*, *supra*, similarly emphasized that liability would only attach if the discount is "sufficiently substantial and is unrelated to the costs of the customer's function," so that "the connection between the seller's price discrimination and the adverse effect on competition is obvious and foreseeable." Pet. App. A9-A10.[14] Thus, petitioner was not held liable for failing to eliminate any possibility that any wholesaler could pass through a portion of a discount. Rather, liability was predicated on evidence indicating that petitioner continued to make available a discount knowing that it was unrelated to the wholesalers' costs of distribution and would likely be passed through to competitors of its own retailer customers.

Accordingly, we do not think that this case on its facts presents the broad issue that petitioner discusses (whether a supplier must show that its discounts to wholesalers relative to retailers are cost based). The case instead presents the narrower question whether a supplier, with *actual knowledge* that its

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sale discount to undersell stations that petitioner supplied directly. See Tr. 1390-1393, 1401-1411, 1416-1417.

[13] Petitioner, it explained, had "made no serious attempt to quantitatively justify its functional discounts" (Pet. App. B5), relying simply on an identification of some of the functions performed. *Id.* at B5-B6.

[14] The Seventh Circuit in *Standard Oil* modified the FTC's original order to indicate that the supplier could be held liable only if it *knowingly* chose a wholesaler customer that intended to use its price advantage to undersell the supplier's price to retailers. 173 F.2d at 217; see also C. Edwards, *supra*, at 307-308. This Court in *Perkins* thought it significant that "Standard officials were aware" of the downstream effect of their discounts at the first level of distribution. 395 U.S. at 649.

wholesaler discount is being passed through and is conferring a competitive advantage on the retailers that are in competition with directly supplied retailers, may be held liable for the resultant competitive injury. That issue, whatever its correct ultimate resolution may be, does not warrant review by this Court at this time. The decision below, when read in this limited fashion, does not conflict with the holding of any other court of appeals.[15] And the serious concerns that we have discussed

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[15] The cases on which petitioner and its amici rely contain only general statements similar to the statement of the court of appeals in the present case that "goods may generally be sold to wholesalers at a lower price than that charged to retailers" (Pet. App. A7). The plaintiff in *White Indus.* v. *Cessna Aircraft Co.*, 845 F.2d 1497 (8th Cir.), cert. denied, 109 S. Ct. 146 (1988), was a retail dealer of aircraft. Insofar as the plaintiff claimed the supplier violated the Act by selling at a discount to wholesalers that passed on the discount to end users, the court said that the allegation *would* state a violation of the Act if true (845 F.2d at 1498), but the allegation was rejected on the facts. The plaintiff, despite being a retailer itself, also sold to other retailers. The footnote quoted in the petition (at 11) rejects the plaintiff's argument that it was a violation of the Act for the supplier to sell airplanes to the plaintiff at the *same* price as offered to a retailer to whom the plaintiff wished to resell. The argument that the Robinson-Patman Act *requires* price discrimination between two retailers is very different from the argument on which respondents prevailed in this case. The statement that the National Association of Manufacturers et al. (NAM) quote (Br. 7-8) from *Eximco, Inc.* v. *Trane Co.*, 737 F.2d 505, 515 (5th Cir. 1984), is not the holding of that case. The *Eximco* court merely held that "this case * * * involves no favored sale." 737 F.2d at 516. In *O'Byrne* v. *Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984), which NAM also quotes (Br. 8), the court merely held that it did not violate the Act for the defendant to charge lower prices to ultimate consumers at *its own* retail outlets than the plaintiffs, who also purchased gasoline from the defendant, were able to charge at retail. That is a far cry from the allegations in this case. *Dart Indus.* v. *Plunkett Co.*, 704 F.2d 496, 499-500 (10th Cir. 1983), which NAM (Br. 8) and the Society of Independent Gasoline Marketers of America et al. (Br. 9) cite, rejects the naked assertion that different prices charged to a wholesaler and to a retailer are necessarily unlawful, in a case in which the plaintiff does not appear to have attempted the kind of proof that was presented in this case concerning the effect of the different prices on competition at a single functional level. The same appears to be true of *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977).

above about a rule requiring suppliers to prove affirmatively that wholesaler discounts are cost based do not apply with the same force to the narrower rule that a supplier must mitigate the known downstream effects of a passed-through wholesaler discount.[16]

Moreover, even if a supplier may in theory be held liable for competitive injury resulting from an independent wholesaler's decision to pass through a discount, it is by no means clear that many plaintiffs will succeed in recovering damages under such a theory. In addition to proving that some portion of the discount was passed through, the plaintiff would have to prevail in showing that the passed-through discount caused actual competitive injury. The mere fact that the plaintiff lost some sales would not conclusively establish such injury, as diverted sales could result from other causes. The inference that substantial price discrimination between competing purchasers over time causes, or tends to cause, competitive injury "may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City*, 460 U.S. at 435; see also 5 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 31.02[3], at 31-78 (1989) ("In third line injury cases * * * additional relevant factors may make it easier to rebut causation than in secondary line cases. Perhaps the most important factor is the intervening business or pricing policies of an independent distributor. These policies * * * may prevent the injury from being the natural or probable 'effect of' the asserted illegal practices.") (emphasis and footnotes omitted).[17]

[16] We do not urge the Court to grant review in this case in order to consider the correctness of the FTC's statement that "the difference in the prices that the wholesaler and retailer pay cannot support a claim of secondary line competitive injury under the Act." *Boise Cascade Corp.*, 107 F.T.C. 76, 199 (1986), rev'd and remanded on other grounds, 837 F.2d 1127 (D.C. Cir. 1988). The Commission found a violation of the Act in *Boise Cascade*, and its comments on whether a violation of the Act could be found on other facts were dicta.

[17] It should also be noted that a supplier can claim the statutory "cost justification" defense if it can demonstrate that the discount afforded wholesalers reflects its own cost savings, without regard to the wholesaler's costs. See 15 U.S.C. 13(a); *Automatic Canteen Co. of America* v. *FTC*, *supra*. Petitioner asserted the cost justification defense in this case, but the district court instructed the jury that the defense had been withdrawn from its consideration (Tr. 3321-3322), and petitioner has not pursued the issue.

In addition, market forces should tend to discourage a supplier from offering independent wholesalers discounts that would allow them to undercut the supplier's own retailer customers. A supplier would not normally find it profitable to offer independent wholesalers a discount in excess of the supplier's cost of providing the distribution services itself. To be sure, wholesalers might be able to undercut the supplier's price to retailers if the wholesalers were more efficient than the supplier in distributing the product. In that situation, however, it would be in the interest of all parties—the supplier, the wholesalers, the retailers, and the ultimate consumers—to structure the distribution network so that all retailers could purchase from the wholesalers. And, in any event, a wholesaler that received a discount in excess of its distribution costs would not necessarily pass it on to retailers. Particularly if the other sources to whom retailers might turn were pricing at a level that did not reflect the discount, the wholesaler might well find it profitable to retain all or most of the discount as profit. Thus, it is not clear that a pass-through theory is likely to lead to recovery in very many cases.[18]

[18] A partial explanation of petitioner's failure to reduce its discount may be afforded by the FEA regulations governing the pricing of petroleum products in the 1970s, which apparently constrained to some degree petitioner's flexibility in adjusting its prices. See generally *Typhoon Car Wash, Inc.* v. *Mobil Oil Corp.*, 770 F.2d 1085, 1087-1088 (Temp. Emer. Ct. App.), cert. denied, 474 U.S. 981 (1985); Tr. 2083-2086 (explanation by petitioner's witness that altering price to distributors in the Spokane market would have "cost" petitioner several million dollars under FEA "cost bank" accounting procedures). Petitioner apparently attempted to reduce its wholesale discount in 1973 and 1977, but that effort was challenged on the basis that it violated then-applicable FEA regulations. Tr. 2038, 2084-2085. The district court rejected petitioner's asserted defense based on the FEA regulations the first time the case was tried. That ruling was affirmed on appeal (663 F.2d at 933) and is not at issue here.

b. Nor is it clear that the issue petitioner presents is of major significance to the ultimate outcome of this case. Despite the emphasis petitioner has placed on the status of functional discounts afforded to independent wholesalers, and the resulting discussions of that issue by the lower courts, a review of the record indicates that the jury could reasonably have viewed Dompier and Gull as retailers in direct competition with respondents.[19] Petitioner does not claim that Gull ever operated solely as a wholesaler, and Dompier concededly was in the retail business beginning in 1974 (Pet. 4 n.3; Pet. App. B4 n.4).[20] In this regard, we do not read the record to support petitioner's contention that respondents have conceded that, if the wholesale discount was lawful in the early portion of the damage period, then the jury's verdict must be reversed Pet. 4 n.3; Reply Br. 2. Respondents' concession, if any, was explicitly limited to whether their damage proof, which was not segregated by time period, would be legally sufficient if petitioner proved that it had a valid "meeting competition" defense for a portion of the damage period. See Tr. 3165-3166.

Although Dompier did not own any retail stations before 1974, some of the retail stations that it supplied were owned and operated by its salaried employees (Pet. App. A5).[21] Accordingly, the jury may well have found liability on the theory that Dompier and Gull themselves competed with respondents.[22]

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[19] The jury also could have viewed Dompier and Gull as dual distributors, who operated at both the wholesale and the retail level. In this respect, the finding of liability is consistent with the decision in *Boise Cascade Corp.*, *supra*.

[20] Indeed, Neil Dompier, president of Dompier, testified that, by the mid-1970s, Dompier sold at retail "[p]robably 84 to 90 percent" of the gasoline it purchased from petitioner. Tr. 757.

[21] Dompier supplied two stations owned by the "Red Carpet" firm formed in the late 1960s by John Dompier, Neil Dompier's father. From 1971 (the beginning of the damage period) until 1973 (when Neil Dompier succeeded his father as president of Dompier), John Dompier was the sole owner and president of both Dompier and Red Carpet. Tr. 755, 797, 1112.

[22] The jury was instructed that, "[i]n order for a nonfavored and favored purchaser or its customers to be in competition with each other, the non-

If the jury viewed Dompier and Gull as competitors of respondents, petitioner could be liable, without regard to a pass-through theory, for offering Dompier and Gull discounts. The FTC has held that an integrated distributor that resells at both wholesale and retail may violate the Act by receiving a wholesale functional discount unavailable to other retailers on the goods it sells at retail. *Boise Cascade Corp.*, 107 F.T.C. at 210-215. Thus, there is no reason to believe that the evidence or the verdict as to petitioner's liability would differ if this Court were to reverse and remand for a third trial.[23] In these circumstances, we do not urge the Court to grant review.

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favored and the favored purchaser or its customers must be on the same functional basis." Tr. 3340-3341.

[23] The damage award might differ, however, because respondents' expert witness based his damage calculation on data relating to four specific stations, not all of which were owned or affiliated with Gull or Dompier. Respondents therefore would be required to present different evidence as to damages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1989

☆ U.S. GOVERNMENT PRINTING OFFICE 1989—241-699/00255

(10)

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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Petitioner,

—*vs.*—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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The Brief for the United States (hereafter "U.S. Brief") confirms that:

1. The court below was mistaken in believing prior decisions of this Court required construing the Robinson-Patman Act to make it unlawful for manufacturers to sell at lower prices to wholesalers than retailers unless impossible conditions are met.[1] As the U.S. Brief

1 The U.S. Brief is emphatic:

"We do not agree with the court of appeals' formulation of the applicable legal standard in this case. The court stated that a supplier that sells at uniform prices to purchasers at the same 'functional' level in the distribution chain nonetheless may be liable under the Robinson-Patman Act if the discount afforded to a par-

explains, ". . . it is not a construction that this Court has ever adopted." (U.S. Br. 8);

2. The lower court's expansion of Robinson-Patman Act liability is contrary to the intent of Congress;[2] and—most significant from the standpoint of need for prompt correction by this Court—

3. The rule formulated by the court below can have devastating consequences for antitrust policy, for the economy and particularly for the small businesses that are wholesalers.

The concerns expressed by the *amici*—from the various wholesaler and independent marketer groups to the National Association of Manufacturers—are underscored by the U.S. Brief. It observes:

> "A rule broadly subjecting suppliers to the threat of damage liability if an independent wholesaler elects to undercut the supplier's price to retailers—and if a jury later concludes that the wholesale discount was not cost based—would represent a significant extension of the law. Under such a rule, a supplier could protect itself from liability only by eliminating the functional discount or by attempting to tailor the discount precisely to the costs and pricing strategies of each individual wholesaler. The former alternative would eliminate the ability of most independent wholesalers to compete with the supplier and thus would be tantamount to outlawing systems of dual distribution.

ticular independent wholesaler is not 'cost-based' and if the wholesaler passes on a portion of that discount to firms that compete with other customers of the supplier." (U.S. Br. 8).

2 As the U.S. Brief explains, "allowing liability to be imposed on the supplier when the disparity in the prices available to firms at the same functional level comes into being only as a result of the intervening pricing decision of an independent firm would, in general, extend the statute beyond the reach intended by Congress." (U.S. Br. 9).

> The latter alternative is probably impossible, since it would require the supplier to obtain data about the costs and pricing strategies of the wholesalers with which the supplier competes for retail sales. Even if it were possible to obtain such data, this strategy would still entail administrative burdens that could impede development of efficient pricing systems. Cf. *Falls City*, 460 U.S. at 449 (a requirement that the "meeting competition" defense be applied on a customer-by-customer basis might make meaningful price competition unrealistically expensive). For example, if the supplier did somehow obtain the necessary data and attempted to tailor the functional discount to each individual wholesaler, it would risk liability for discriminating among wholesalers if it failed to calibrate the discount precisely and thereby caused competitive injury to a wholesaler.
>
> Moreover, suppliers' efforts to avoid liability could penalize efficiency and discourage price competition. The wholesalers most likely to have their discounts reduced or eliminated by suppliers fearful of liability under the Act would be the ones with the lowest distribution costs and the most aggressively competitive pricing policies. [footnote omitted] Thus, such a construction of the Act would conflict with this Court's admonitions that, whenever possible, courts should avoid interpretations of the Robinson-Patman Act that undercut the procompetitive purposes of the antitrust laws." U.S. Br. 9-11.

While acknowledging the array of detrimental consequences of the legal rule formulated below, the U.S. Brief recommends this Court do nothing, leaving the rule to cause confusion and inhibit wholesaling generally, and to be absolutely controlling in the nine states comprising the Ninth Circuit. That court, in this very case, admonished the district courts that they may not decline to follow the legal construction adopted by the court of appeals "no matter how egregiously in error they may feel their

own circuit to be." *Hasbrouck* v. *Texaco Inc.*, 663 F.2d 930, 932 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).[3]

Respectfully, the premises upon which the recommendation is made are mistaken.

A. First, the U.S. Brief asserts it is constrained to reach its conclusion because of the statement in *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) that "[t]his Court . . . reviews judgments, not statements in opinions." (U.S. Br. 6). *Black* involved review of a *state* court decision found to rest on an adequate state ground. As this Court explained there:

> "This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." 351 U.S. at 298.

Plainly, establishment of a new, destructive, construction of the federal antitrust laws by a major federal court of appeals, whose rule is controlling in its circuit and potentially disruptive nationwide, is hardly comparable to an erroneous statement of federal law by a state court whose decision rests on state grounds. The present case invokes an entirely different level of

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3 The district court had granted judgment n.o.v. in favor of Texaco because plaintiffs, notwithstanding this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), chose to confine their evidence to "automatic damages" pursuant to the Ninth Circuit's pre-*Brunswick* opinion in *Fowler Mfg. Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). The district court correctly recognized that *Brunswick* effectively undermined *Fowler*. By the time of the appeal, this Court too had explicitly rejected "automatic damages" on the basis of *Brunswick* in *J. Truett Payne* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). The Ninth Circuit acknowledged that "*J. Truett Payne* confirms the trial court's ultimate conclusion . . . ." (663 F.2d at 932) and that "the Supreme Court relied upon *Brunswick* in deciding *J. Truett Payne* . . . ." (663 F.2d at 933 n.1). Nonetheless, it remanded for a new trial, concluding that the district court erred by considering *Brunswick* and not blindly following *Fowler* until it was explicitly overruled.

this Court's responsibility. *Cf. Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 185 (1980).[4]

The decision of the court of appeals neither rests on any state ground nor, indeed, on any ground other than that enunciated by the Ninth Circuit.[5]

B. Second, although it would seem malpractice or at least foolhardy for any lawyer or client to conclude that the Ninth Circuit did not mean precisely what it repeatedly said the Robinson-Patman Act requires of those selling to wholesalers, the U.S. Brief suggests as a reason for denying review the tentative possibility that someone may read into the Ninth Circuit's new construction of the Robinson-Patman Act a further requirement of awareness by a supplier that a wholesaler has at some time passed along some portion of its discount to a retailer customer. The addition of an "awareness" requirement is based upon an ambiguous statement in the jury charge, which was not mentioned by the court of appeals, relating to the assessment of competitive effect. The U.S. Brief urges that if the decision below is "read in this limited fashion," the "serious concerns that we have discussed above about a rule requiring suppliers to prove affirmatively that wholesaler discounts are cost based do not apply with the same force . . . ." (U.S. Br. 13-14).

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4 Noting that although "[t]here is no direct conflict, but a number of decisions exhibit some tension on questions of patent misuse and the scope of 35 U.S.C. § 271(d)," (448 U.S. at 185 n.4), the Court in *Dawson* "granted certiorari . . . to forestall a possible conflict in the lower courts and to resolve an issue of prime importance in the administration of the patent law." Given the seriously harmful potential of the Ninth Circuit's decision, as the U.S. Brief acknowledges, this case presents an even more compelling basis for this Court's attention.

5 And, as the U.S. Brief implicitly recognizes in noting that upon a new trial respondents "would be required to present different evidence as to damages," (U.S. Br. 17 n.23), the present judgment is not sustainable.

Respectfully, not only is the prospect for such a "limited" reading uncertain at best,[6] it hardly would eliminate the various "serious concerns" recognized by the United States. While there always may be complaints from retailers that others are selling below where they would like the consumer price to be,[7] what would the United States have the manufacturer do when it receives such a complaint? Demand that the price-cutting retailer's wholesaler disclose its pricing and its costs, and propose to monitor them from now on? To what end? Terminate the efficient or price-cutting wholesaler? Discriminate in price against that wholesaler? Demand that the wholesaler induce its retailer to get its price up or terminate the retailer? Just get the wholesaler to agree it will not pass along any of its discount to any of its retailers? Respectfully, reading in an "awareness" requirement makes no antitrust or economic sense and will merely generate and prolong litigation. Indeed, the U.S. Brief does not purport to be a proponent of the Ninth Circuit's rule even with the addition of an "awareness" gloss. Rather, it leaves open the "correct ultimate resolution" (U.S. Br. 13) of this issue. The U.S. Brief underscores the need for this Court to clarify Robinson-Patman liability in respects that so fundamentally impact virtually all American industry and commerce.

C. Finally, the U.S. Brief conjectures that perhaps the courts below should not even have addressed the issue of a supplier's

6 The U.S. Brief does not claim the case does not stand "for the proposition that a supplier must undertake affirmatively to monitor the costs and pricing policies of wholesalers to which it offers a functional discount" but merely that "[w]e do not believe that the case *necessarily* stands" for such a proposition. (U.S. Br. 6-7; emphasis added). Despite this understandable hesitancy, the U.S. Brief unaccountably rewrites the first Question Presented to assume that the court below *sub silentio* adopted an "awareness" requirement.

7 As this Court recognized in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984):

> "[C]omplaints about price cutters 'are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals.' "

Making complaining about a rival's lower price a predicate to windfall treble damage recoveries, of course, would serve to further encourage proliferation of such complaints.

liability for selling at a uniform price to wholesalers who sell to independent retailers, suggesting it might have been possible to rest the case on Dompier's retail operations (U.S. Br. 16-17).[8] However, the U.S. Brief acknowledges, obliquely to be sure, that plaintiffs chose to base damages on Dompier's wholesale sales to independent retailers (*id.* at 17 n.23), so that the verdict simply could not have been sustained without confronting the issue of wholesaling. Indeed, plaintiffs themselves advised the jury that Dompier did not acquire its first retailer until 30 months into the damage period and acquired a few others only over several years (Tr. 3183). Plaintiffs also necessarily drew no distinction between independent retailers and employee-operated stations in addressing other elements of Robinson-Patman liability, such as competition between favored and non-favored customers and competitive impact. (B-6 n.6).

Thus, with respect to competitive impact, although it was an admitted fact that Dompier's prices were set solely by Dompier (ER 539-40), plaintiffs' counsel advised the jury:

> "This case could have been brought if Mr. Dompier had never salary operated a station, but it only supplied stations the whole time if he was passing the discount to them. . . . If the favored price is passed through the purchaser like Mr. Dompier to his customer, that's price discrimination." (Tr. 3304)

The district court also instructed the jury that the basis of plaintiffs' claim is that lower prices to Dompier "were passed through to Dompier Oil Company's customers." (Tr. 3334). Under the circumstances, there is no basis for suggesting otherwise or attempting to conjecture about the possible outcome of

8 The district court noted that Dompier "eventually operated four Texaco retail stations" (B-4 n.4); Dompier continued to act as a pure wholesaler to some twelve independent retailers (ER 34-35). The reference by the U.S. Brief (16 n.20) to testimony of Neil Dompier about the high percentage of his business being "retail", was a comparison of his sales to retailers (retail sales) as against other accounts such as farmers; he was not differentiating between employee-operated and independent-operated retail outlets.

a third trial that would not be based upon Dompier's independent sales to independent retailers.

In any event, once this Court has corrected the crucially erroneous standards of Robinson-Patman liability formulated by the court of appeals, it may remand for determination of whether the action should be dismissed or whether an alternative disposition is appropriate.[9]

Conclusion

As the Brief of the United States demonstrates, the standards of Robinson-Patman liability on sales to wholesalers adopted by the court of appeals are wrong and give rise to serious concerns for the future of wholesaling and the businesses presently in that field. The matter is of major national significance, compelling this Court's attention. Respectfully, the petition for a writ of certiorari should be granted.

Dated: June 2, 1989

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9 At trial, plaintiffs chose to make it impossible for the jury to exclude from damages amounts attributable to the period before mid-1974 when Dompier operated no retail stations. Since the jury could not segregate that period out, plaintiffs acknowledged that if they were not entitled to damages for the entire period, "they haven't proven their damage theory with reasonable certainty . . . and the plaintiffs aren't entitled to a verdict." (ER 530). While this representation was in the context of a discussion of the "meeting competition" defense, the principle would seem equally applicable whatever the basis for the legality of the prices during that period. The U.S. Brief questions whether this is so. (U.S. Br. 16). Plainly, the matter can be resolved by the courts below upon remand.

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No. 87-2048 (2)

In The

Supreme Court of the United States

October Term, 1987

Texaco Inc.,

Petitioner,

v.

Ricky Hasbrouck, d/b/a Rick's Texaco, *et al.,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

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July 14, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-2048

TEXACO INC.,

Petitioner,

v.

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Texaco Wholesalers hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the National Association of Texaco Wholesalers arises because its members will be directly and negatively affected should the ruling of the Court of Appeals for the Ninth Circuit stand. The Association is

better able to argue the effect of this case on its members than either of the parties would be.

Respectfully submitted,

S/

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

INTEREST OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

The National Association of Texaco Wholesalers is an independent trade association composed of 1,300 wholesalers of "TEXACO" petroleum products. These wholesalers supply approximately 15,000 retail outlets, and collectively sell over half the gasoline and over 70 percent of the "middle distillates" refined by Texaco and sold in the United States.

As detailed below, the Ninth Circuit's decision in this case threatens to destroy the entire wholesale sector of petroleum marketing, including the businesses of every member of the Association. Accord-

ingly, the members have a vital interest in the outcome of the action.

REASONS FOR GRANTING THE WRIT

The National Association of Texaco Wholesalers will absorb the first impact of the Ninth Circuit's ruling if it is not reversed, but that blow will be followed by widespread disruption of wholesaling in every industry in the United States. The fate facing the Texaco wholesalers if this ruling is allowed to stand is, by itself, a compelling ground for granting the writ; but is only illustrative of the impending restructuring of distribution throughout the economy.

Specifically, if Texaco is forced to apply the Ninth Circuit's rule, it will have to either eliminate sales to retailers or eliminate discounts to wholesalers. "Cost justification" of discounts to each wholesaler is a notion that has meaning only to theorists—the reality is that Texaco will not assume either the risk or the enormous burden of estimating each wholesaler's costs and providing a commensurate wholesale discount.[1] Instead, it will sell to wholesalers at the same price it charges to retailers, effectively putting the wholesalers out of the wholesaling business. The only alternative would be for Texaco to halt direct sales to retailers entirely, which is plainly not the result that Hasbrouck desired or that Texaco is likely to choose.

If the Texaco wholesalers are faced with the prospect of paying the same prices as retailers they will

[1] The Ninth Circuit's ruling would force suppliers to sell to different wholesalers at different prices, a result which on its face conflicts with the rule against discrimination among competing distributors.

have two choices: Go out of business or expand into retailing. Of those who survive, many will decide to become chain retailer accounts instead of functioning as wholesalers. They will integrate vertically by acquiring retailers in their area, including many of the very retailers they are now selling to at wholesale. The economics of the situation will compel them to acquire as large a number of outlets as they can handle, so that their existing storage and distribution facilities (now used for wholesaling) will be fully utilized.

Ultimately, instead of having several wholesalers and Texaco itself all selling to retailers in the same market, as was the case in Spokane, there will be only Texaco, selling to chains of vertically integrated retailers, each of which will own the distribution and storage facilities they formerly ran as independent wholesalers. An entire level of competition will disappear. Worse yet, this scenario will be repeated in industry after industry throughout the nation.

This would be an economically disastrous result. Indeed, this Court on more than one occasion has voiced concern over excessive vertical integration in the chain of distribution. Only this year, in *Business Electronics Corp.* v. *Sharp Electronics Corp.* 108 S.Ct. 1515, 1520 (1988), the Court warned against an antitrust standard that "would create a perverse incentive . . . to integrate vertically into distribution, an outcome hardly conducive to fostering the creation and maintenance of small businesses." Similarly, in the pivotal case of *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 57 n.26 (1977), the Court observed that to the extent an antitrust rule prevents a firm from using a distribution system "to achieve

efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration . . . , thereby eliminating to that extent the role of independent businessmen."

Even in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), which *Sylvania* overruled, the Court cautioned against adoption of a rule of antitrust law that "might sharply accelerate the trend towards vertical integration of the distribution process."

This caution is particularly applicable with regard to the Robinson-Patman Act, which is recognized to have real potential for anticompetitive effects and inefficient results and has therefore been approached with reservations. *See e.g., Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69,80 (1979), where the Court warned that the Robinson-Patman Act can be "in open conflict with the purposes of other antitrust legislation" if extended too far, and stated that the Act "should be construed consistently with broader policies of the antitrust laws".

CONCLUSION

Once the process the Ninth Circuit has set in motion is completed, everyone will pay higher prices—unless this Court seizes the opportunity to review this new "cost justification" standard. Ultimately, the consumer will pay more, not only for gasoline, but for every product now distributed through wholesalers. For all of these reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: July 14, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregg R. Potvin, a member of the Bar of this Court, hereby certify that on this 14th day of July, 1988, three copies of the Motion for Leave to File a Brief Amicus Curiae in the above titled case were mailed, first class postage prepaid, to counsel for petitioners, and to counsel for respondents, as listed below. I further certify that all parties required to be served have been served.

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GREGG R. POTVIN

No. 87-2048 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO, INC.,
Petitioner,

v.

HASBROUCK, d/b/a RICK'S TEXACO, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

The Petroleum Marketers Association of America (PMAA) submits this brief *amicus curiae* in support of the petition for writ of certiorari filed by Texaco, Inc., No. 87-2048.

INTEREST OF AMICUS CURIAE

The PMAA is a federation of 43 State and regional trade associations representing over ten thousand small business petroleum marketers.[1] Together, PMAA members market

[1] A list of the constituent State and regional trade associations that comprise the PMAA is set forth in the Appendix hereto.

approximately 50 percent of the gasoline and 75 percent of the home heating oil sold in America. In addition, they supply roughly two-thirds of the Nation's retail motor fuel facilities,[2] approximately three-quarters of which are operated by independent retailers. PMAA members are comprised primarily of jobbers and other wholesale distributors of refined petroleum products as well as chain retailers that market motor fuels through service station outlets. Historically, refiners have chosen to market a large percentage of their products through independent marketers because the Nation's vast petroleum supply network requires capital and manpower expenditures greater than the resources of even the largest corporate entities.

The PMAA has a direct and significant interest in the pending petition for certiorari. The petition seeks review of a decision of the Ninth Circuit Court of Appeals[3] that unquestionably affects the economic interest of PMAA members; quite simply, it impacts on their ability to purchase petroleum products from a manufacturer at lower prices than are available at the retail level of trade. Wholesale distributors, of course, resell the products they purchase to independent retailers, a function that cannot be performed if they are required to purchase petroleum at the same prices that are offered to their customers' competitors.

[2] Independent marketers own or lease over 58,000 retail facilities nationwide and store fuel at over 10,000 additional "bulk plants." PMAA's 1986 member survey discloses that its members supplied 97,871 of America's approximately 150,000 retail motor fuel distribution outlets (e.g. gasoline stations, truck stops, convenience stores, etc.). Their 230,000 employees service this network with roughly 100,000 vehicles and they bear the credit costs and risks of approximately $13 billion in credit card sales that they and their dealers make to the American motoring public annually.

[3] *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988).

The price disparities that exist at the wholesale and retail levels of trade are reflective of the functional differences that exist between wholesalers and retailers and have been a hallmark of the petroleum distribution system for generations. Yet the court below regards them not as part of the normal functioning of the system, but as anomalies that cannot be justified absent rigorous regulation by the manufacturer to insure that functional discounts do not exceed the value of the services performed by the wholesaler. Thus, the court below would sanction an inference of illegal price discrimination whenever price disparities exist between non-competing wholesalers and retailers and the benefits of the wholesaler's lower prices are passed through, in whole or in part, to its retail customers.

Not only is the Ninth Circuit's decision in this case unprecedented as an application of the Robinson-Patman Act, 15 U.S.C. Section 13(a), but also in the impact it will have on the fabric of the petroleum industry, and particularly upon the ability of wholesale distributors to remain a competitive force in the distribution of petroleum products. By subjecting the manufacturers of petroleum products to liability for the independent decisions of wholesale marketers to pass through some portion of their wholesale discounts, the lower court risks the elimination of such discounts and invites a system of price regulation by manufacturers that is not responsive to a free play of competitive forces.

ARGUMENT

Owing mainly to the imprecision with which the Robinson-Patman Act was drafted, the efforts of the courts in this area have been aimed primarily at achieving results thought to be consistent with the spirit or purposes of the Act. *See, e.g., Boise Cascade Corp. v. F.T.C.*, 837 F.2d 1127, 1138 (D.C.

Cir. 1988). Thus, the body of decisional law that grew up around the Act is a patchwork of often inconsistent rules and proscriptions, each of which was crafted to combat the evils that were the focus of the Act in one of the vastly different circumstances that arise in complex competitive markets. Because these rules sometimes come into conflict with one another, however, or with the purposes of other antitrust legislation, their application in a particular case cannot be automatic; on the contrary, Robinson-Patman precedents that do not fit the logic of particular contextual circumstances or the industry to which they are being applied can often lead to counter-productive results.[4]

This case presents a classic example. Here, the Ninth Circuit drew upon a series of disparate judicial interpretations and applications and forged a decision that neither comports with the purposes of the Robinson-Patman Act nor is workable within the complex petroleum distribution system. As will be developed more fully below, the decision of the court of appeals is structured, as if by rote, from rules meant for vastly different situations. That they do not gel in the context of this case is apparent from the fact that the decision would result in the elimination of wholesale discounts in many cases and,

[4] Nowhere is the uncertainty infecting the Act more prevalent than in the area of functional or wholesale discounts. As then-Professor (now Acting FTC Chairman) Calvani noted: "[T]he uncertain status of functional discounting is primarily due to the failure of Congress, the Federal Trade Commission, and the courts to give explicit and independent recognition to the practice and to define with any modicum of specificity its permissible contours. The result of this failure of recognition has been a lack of focus upon the validity of the functional discount which, in turn, has left the law in a state of confusion, causing often legitimate practices to be condemned." Calvani, *Functional Discounts Under the Robinson-Patman Act, 17 B.C. Indus. & Com. L. Rev. 543, 543-44 (1976). See also, e.g., Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65-74 (1953).

in place thereof, the establishment of a cumbersome cost-based pricing system that is unresponsive to the competitive realities of a free market. This was clearly not the objective of the Robinson-Patman Act.[5]

I. The Ninth Circuit's Decision Will Usher In A Regime Of Refiner Price Regulation Or Other Anticompetitive Forces In The Petroleum Industry

A. Wholesale Discounts Are Essential To The Maintenance Of The Present Competitive Pricing System

For generations, the petroleum industry has been characterized by a complex distribution scheme involving dozens of refiners and their marketing subsidiaries, thousands of independent wholesale distributors, and tens of thousands of chain retailers and independent service station dealers. The distribution system evolved in response to the demands of market forces and has maintained a synergism among the various participants, each of which brings its unique efficiencies to a wide variety of competitive markets. Each of these participants plays an integral role in the system which would be vastly different in its absence.

Wholesale distributors, for example, are generally supplied with petroleum products by large refiners and they resell the products to independent service station dealers. For the most

[5] The Supreme Court summarized the purposes animating Congress in passing the statute in the following way:

> The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chain stores and other big buyers that threatened the existence of small independent retailers. *Great A&P Tea Co. v. F.T.C.*, 440 U.S. 69, 75-76 (1979).

part, they occupy a market niche in areas where it is not cost-effective for their refiner-suppliers to maintain direct marketing operations. Competitive markets for petroleum products, of course, are not national or regional, but local.[6] Thus, a major refiner can maintain its brand in a particular local market without incurring the expenses of investing its capital in marketing facilities. As the U.S. Department of Energy ("DOE") observed after a review of refiner marketing strategies, ". . . jobbers are more efficient and better positioned to distribute in more widely dispersed areas where distribution costs tend to be relatively high for refiners."[7]

Depending upon logistical and other considerations, a given refiner may choose to market directly in an area or market exclusively through wholesale distributors. Because of demographic changes, however, historical marketing patterns in certain areas have been altered and it is not uncommon for refiners to engage in dual distribution in certain areas, i.e., to market directly as well as through branded distributors. Thus, some jobbers have found themselves confronted with competition from their own suppliers in certain marketing areas, sometimes referred to as overlap areas. "[T]hese overlap areas exhibit intense price rivalry . . . [a]s a result, . . . [the DOE concluded] that the competitive process is working vigorously in these areas with the consumer the ultimate beneficiary."[8] Because of their efficiencies, wholesale distributors are able to operate in these areas and they are often the only factor separating a vibrant competitive market from one that is characterized by stagnancy and higher than average prices.

[6] As the U.S. Department of Energy has already determined, no one will drive more than a few miles in search of a lower price for gasoline or, given the transportation costs involved, order heating oil from another city. See, "Guidelines For Evaluation Of Applications For Assignment Of Supplier And Base Period Use To New Gasoline Retail Sales Outlets," 42 Fed. Reg. 15459 (March 22, 1977).

[7] U.S. Department of Energy, Deregulated Gasoline Marketing, *Consequences for Competition, Competitors and Consumers*, DOE/CP-0007 (1984) at 43.

[8] *Id.* at 126 n.2.

While wholesale distributors are woven deeply into the fabric of the petroleum industry, their presence is made continually precarious by changes or alterations in the pricing practices of their refiner-suppliers. In areas where they market, wholesale distributors can be profitable only when the prices at which they purchase petroleum products enable them to resell at a profit, after incurring the distributional costs of storing, delivering and promoting the product, helping their customers become successful marketers, extending credit and providing for investments in tools, tanks, trucks and other equipment. In short, wholesale distributors are extremely price sensitive and they cannot afford to purchase petroleum products at the same prices that are offered to the independent service station dealers whom they are in the business of supplying.

Refiner suppliers have traditionally offered functional discounts to jobbers and other wholesale distributors because of the savings realized by the refiner who would otherwise be required to make additional capital investments. While each individual wholesale discount may not be equal to the average cost savings realized by the refiner for that particular sale, the aggregate of all wholesale discounts offered by a given refiner in a given market, over a period of time, must be offset by the savings to the refiner from not establishing a major market presence. Were it not so, refiners would maintain direct marketing operations in all areas where they wish to market and there would be no wholesale distributors.

Wholesale discounts of the type at issue in this case enable independent distributors to operate as an alternative, in many

markets, to their refiner-suppliers whose higher fixed costs and lower efficiencies in the same markets usually result in less competition and higher prices.

B. By Threatening The Existence Of Wholesale Discounts, The Decision Below Will Reduce The Impact Of Wholesale Distributors As A Competitive Force In The Petroleum Industry

While acknowledging that wholesale or functional discounts offered equally to all wholesale distributors will not normally constitute illegal price discrimination, the Ninth Circuit held that injury to competition is established, *prima facie*, whenever the price differentials between non-competing wholesale and retail customers: (1) exceed "the value of the services [a wholesale distributor] perform[s];" and (2) the discount is passed through, in whole or in part, to the wholesaler's retail customers. 842 F.2d at 1039.

This doctrinaire application of the Robinson-Patman Act is most troubling because it exposes refiner suppliers, such as Texaco, to liability for the independent pricing determinations of their wholesale customers. Under the court of appeals' decision, refiners risk liability whenever their wholesale customers decide to pass on a portion of a wholesale discount to retailers.[9] Thus, any refiner offering wholesale discounts risks running afoul of Section 2(a) of the Robinson-Patman Act unless it: (1) stops offering wholesale discounts; (2) prohibits its wholesale customers from passing through all or a portion of

[9] *See, Purolator Products, Inc. v. F.T.C.*, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968) ("If the seller cannot control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition.").

the discount; or (3) regulates the level of pass through based upon precise calculations as to the "value" of the distributional services performed by the wholesale customer with respect to each sale. Any one of these alternatives would have extraordinary consequences for the petroleum industry.

The consequences for wholesale distributors of losing their discounts are obvious; if they purchase petroleum products at the same prices that are available to direct-buying retail dealers, they would be unable to resell the product to their own retail dealer customers at competitive prices. The same would be true if they were prohibited from passing through any portion of their discounts to retail customers. Were that the case, there would be no incentive to practice the efficiencies that make such pass throughs possible.[10] Moreover, to the extent that a wholesale distributor and its refiner-supplier cooperate in a scheme to regulate pass throughs, they would be exposed to resale price maintenance claims under Section 1 of the Sherman Act.[11]

Finally, no refiner-supplier can be expected to incur the massive administrative burden associated with justifying each functional discount on a cost-savings basis. The refiner-supplier would be required to know the number of days the product was stored by the distributor prior to resale, whether credit was extended upon resale and the credit risk, the costs associated with delivery of the product by the wholesale distributor to its own customer, as well as the *pro rata* portion of all of the other fixed and variable costs associated with delivering

[10] In many cases, the incentive animating wholesalers to achieve efficiencies and market at the lowest practical price is to increase market share.

[11] 15 U.S.C. Section 1. The longstanding recognition of price maintenance as a Sherman Act violation is reflected in this Court's opinion in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960).

a certain volume of product to a given destination. It would also be required to place a "value" on certain intangible services provided by the wholesaler, such as product promotion and the assistance provided retail dealers in becoming effective marketers. These costs vary from distributor to distributor and from time to time and are impossible to calculate with any degree of precision.

The decision of the Ninth Circuit, therefore, will signal the demise of at least those wholesale distributors in overlap areas, whose presence in the distribution system can no longer be justified if refiner-suppliers are exposed to a substantially increased risk of antitrust liability. Those wholesalers that remain, moreover, will be subjected to a form of refiner price regulation that can only lead to higher prices and less competition at the wholesale and retail levels. While it is impossible to estimate the extent of these dislocations, one thing is certain, that is, the effect will be anticompetitive and in contravention of the stated objectives of the Robinson-Patman Act.

II. This Court's Precedents Cannot Support A Decision, Such As The One Below, That Contravenes The Objectives Of The Robinson-Patman Act

This Court warned long ago of the dangers of doctrinaire interpretations of Robinson-Patman that could lead to "conflict with the purposes of other antitrust legislation," *Automatic Canteen Co. v. F.T.C., supra*, 346 U.S. at 63, and that warning has been repeated in more recent times. See *United States v. Gypsum Co.*, 438 U.S. 422, 450-51 (1978); *Great A&P Tea Co. v. F.T.C., supra*, 440 U.S. at 80. That the Ninth Circuit did not heed this warning is apparent from the anticompetitive impact its decision will have on the petroleum distribution system.

To be sure, the court below applied some of the precedents established by this Court. But in so doing, its focus was narrow and unguided by the objectives of the Act. The Robinson-Patman Act was aimed at protecting small retail businesses against favoritism toward their larger competitors and its objective was the elimination of the competitive advantage a large buyer could secure solely because of its quantity purchasing ability. *F.T.C. v. Morton Salt*, 334 U.S. 37, 43 (1948). The focus of the Act was the quantity discount to large buyers and the inability of other buyers, at the same level of distribution, to secure the same discount so long as they performed the same function. It was not aimed at dismantling a system of functional discounts that was associated with the petroleum industry prior to passage of the Act and which has contributed to its efficiency for generations.[12]

As stated above, the Ninth Circuit reached this result through a rote application of precedents that were meant for vastly different situations, without any real focus on enhancing the Act's purpose and design. Relying on this Court's decisions in *Morton Salt* and *Falls City Industries, Inc. v. Vanco Beverages, Inc.*, 460 U.S. 428 (1983), the court of appeals held that a plaintiff may prove competitive injury under Robinson-Patman simply by showing that a substantial price disparity existed between himself and his competitors over a period of time. 842 F.2d at 1041. Then, citing *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49 (1969), it applied the

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[12] In fact, one of the purposes of the Act was to preserve the multitiered distribution system by preventing powerful retailers from receiving discriminatory price advantages. *See generally*, J. Palamountain, *The Politics of Distribution* 188-234 (1955). *See also, e.g.*, F. Rowe, *Price Discrimination Under the Robinson-Patman Act 11* (1962), ("the prototype of the Robinson-Patman Act originated with the United States Wholesale Grocers Association, whose members felt the [retail] chain stores' competitive pinch.").

Morton Salt standard to this case, even though the plaintiffs and the favored buyers do not compete. It held that the *Morton Salt* inference of competitive injury is applicable to non-competing buyers when the favored buyer passes on "all or a portion" of its discount to its own customers. 842 F.2d at 1041. These precedents, however, were not intended to be combined in this fashion to attack "a long-established, widespread practice within a vibrant, dynamic industry."[13]

In *Morton Salt*, for example, this Court was confronted with a salt manufacturer's discount pricing system under which only the five largest retail grocery chains in the country were able to buy enough salt to qualify for the manufacturer's most lucrative discount. This was the classic Robinson-Patman case aimed at the very type of price discrimination that the Act was designed to prevent, namely, a system that discriminates among *competing* buyers simply by virtue of their size. Thus, it was self-evident to this Court that the longstanding and substantial price disparity in *Morton Salt* was proof of the evil that Robinson-Patman was aimed at preventing.

Where there are no functional differences between competing purchasers, substantial price disparities give rise to an inference of illegal price discrimination because there is no apparent justification for the price difference other than the favoritism that prompted Congress to enact Robinson-Patman.[14] Thus, under the doctrine set forth in *Morton Salt*, the burden rests with the manufacturer to justify the discount "based on his actual savings in cost." *Morton Salt*, 334 U.S. at 48.

[13] *See, Boise Cascade Corporation v. F.T.C., supra*, 837 F.2d at 1146.

[14] In the circumstances of *Morton Salt*, this Court found a basis for the inference of illegal price discrimination in "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." 334 U.S. at 46-47.

In recent years, this Court has not been hesitant to apply the *Morton Salt* inference of competitive injury to other "cases involving 'large buyer preference or seller predation.' " *Falls City*, 460 U.S. at 436. But in each of these cases, the inference was applied in a context where the favored and disfavored buyers were actually in competition.[15] In *Falls City*, of course, the Court applied the *Morton Salt* rule to a pricing system that discriminated solely on the basis of the geographic location of the buyer. In that case, Indiana distributors of Falls City beer were charged higher prices than Kentucky beer distributors — again, the very sort of arbitrary price discrimination among competing customers that was the focus of the Act.

Unlike *Morton Salt* and *Falls City*, however, the price discrimination at issue here was not applied to competing purchasers. Nor was it rooted in any favoritism for an elite group of Texaco's largest customers; indeed, there is no dispute that the wholesale discounts at issue were made available to all wholesalers, irrespective of size.[16] Quite to the contrary, the pricing system involved in this case discriminates logically among wholesalers and retailers based upon the functions they perform and enables wholesalers to operate on a competitive basis in an industry that is distinguished by intense competition at the wholesale and retail levels. It cannot be "self-evident," therefore, that the price disparity between

[15] *See, e.g., National Dairy Products Corp. v. F.T.C.*, 395 F.2d 517, 521 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968); *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972). *See also, e.g., Barnosky Oils Inc. v. Union Oil Co.*, 665 F.2d 74, 83-84 (6th Cir. 1981); *Hruby Dist. Co.*, 61 F.T.C. 1437, 1446 (1962) ("In its section 2(a) price discrimination cases the Commission has long recognized the legality of price differences based upon differences in the level of distribution of the customers who are charged disparate prices.").

[16] (ER 432, 435-36, 438).

petroleum wholesalers and retail service station dealers is *prima facie* evidence of illegal price discrimination. If anything, the inference should be just the opposite, that is, an inference that price disparities between non-competing wholesalers and retailers are deemed justified on a functional basis in the absence of direct evidence of harm to competition.

The court below felt obliged to apply the *Morton Salt* inference of competitive injury to non-competing wholesalers and retailers on the basis of this Court's decision in *Perkins v. Standard Oil Co., supra*. It cited *Perkins* for the proposition that substantial price disparities between wholesalers and retailers of petroleum products give rise to the same inference of illegal price discrimination as do price disparities that exist between competing purchasers, so long as the wholesaler passes on a portion of its discount to its retail customers. Yet in Perkins the favored and disfavored buyers were dual distributors operating at both the wholesale and retail levels. The disfavored buyer, Perkins, "was both a wholesaler, operating storage plants and trucking equipment, and a retailer through his own Perkins stations." 395 U.S. at 44. The favored buyer, Signal Oil & Gas Company, was the parent of vertically integrated subsidiaries, one of which operated a chain of retail service stations. *Id.* at 645. Functionally, there was no difference between the favored and disfavored buyers; both of them purchased gasoline from Standard and resold the product at their own directly operated stations.

Unlike the situation presented here, *Perkins* has all of the elements of a paradigmatic Robinson-Patman case. Because Signal furnished Standard with part of its vital supply of crude petroleum, it was able to insist upon a lower price than was offered to its competitor, Perkins, who performed the same marketing functions. *Id.* at 647. The root of the controversy was the favoritism shown to one buyer over its competitor

based upon factors that are unrelated to the functions they performed. As was the case in *Morton Salt*, illegal price discrimination was "self evident" and inferred from the price disparities that resulted from the favoritism shown to Signal.

Rather than focusing on the essence of *Perkins*, and the manner in which it fit the Act's purpose and design, the court below seized on certain language that has no application in the instant case. The language referred to by the Ninth Circuit — involving the Robinson-Patman liability of wholesalers who "pass through" their discounts to retailers — was meant to ensure that the favored buyer, Signal, did not escape Robinson-Patman liability on purely technical grounds, even though its conduct violated the objectives of the Act. In *Perkins*, of course, Signal's price advantage was "passed on" to one subsidiary which, in turn, passed it on to another subsidiary that competed with Perkins at the retail level. When the lower court found that there was too tenuous a connection between Signal's price advantage and its subsidiary's lower retail prices to support an inference of causality, this Court reversed, holding that the scheme is "wholly untenable when viewed in light of the purposes of the Robinson-Patman Act." 395 U.S. at 647. Indeed, such a scheme "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." *Id.* In essence, this Court found that Signal, and not its retail subsidiary, was the "customer" that competed with Perkins.[17]

In this case, unlike *Perkins*, there is no artificial link in the distribution chain; rather, any pass throughs of functional discounts occurred between wholly independent wholesalers and retailers and were at all times dictated by a free play of com-

[17] *Perkins v. Standard Oil Co., supra*, 395 U.S. at 647.

petitive forces. The "pass-through" language of *Perkins*, therefore, does not support an inference of illegal price discrimination where, as here, the favored and disfavored buyers truly do not compete.[18]

In short, the decision of the court below contravenes the purposes and objectives of the Robinson-Patman Act as well as other antitrust legislation aimed at protecting competition. Wholesale discounts of the type at issue in this case are essential to the continued existence of many wholesale distributors and to the efficiencies they bring to the petroleum distribution system. Such discounts are part of the normal functioning of a highly competitive industry; in the absence of direct evidence of harm to competition, therefore, the only thing that is "self-evident" is that the system is functioning as it should and that any price disparities which exist between non-competing wholesalers and retailers reflect the different functions they perform at different levels of trade. These differences clearly should not give rise to an inference of illegal price discrimination.

[18] That the *Morton Salt* inference of competitive injury was not intended to be applied in the circumstances presented here is obvious from this Court's subsequent applications. In *Falls City*, for example, the Court stated that "[the] inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City*, 460 U.S. at 435. In the circumstances presented here, the causal connection is necessarily broken by the independent pricing determination of the wholesale distributor to pass through all or some portion of its functional discount. Thus, where the inference arises from price disparities between non-competing wholesalers and retailers, the inference of illegal price discrimination is overcome *a fortiori* at the same time that it is established.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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(5)

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO, INC.

Petitioner,

-- vs. --

RICKY HASBROUCK, d/b/a RICK'S TEXACO, et al.

Respondents.

MOTION OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF TEXACO, INC.'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MOTION OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF TEXACO, INC.'S PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 36.1, the National Association of Convenience Stores (NACS) and the Society of Independent Gasoline Marketers of America (SIGMA) move for leave to file an amici curiae brief in support of the petition of Texaco, Inc. for a writ of certiorari. The consent of petitioner Texaco, Inc. and respondents Ricky Hasbrouck *et al.* to the filing of this brief has been requested. Texaco gave its consent but the respondents declined to grant their consent.

SIGMA is a national trade association of 297 independent marketers of motor fuels. SIGMA members operate as wholesalers and chain retailers in all 50 states, selling petroleum products through more than 9,800 retail outlets which they own and supplying products to an additional 10,400 retail outlets owned by other companies. NACS is the national trade association of the convenience store industry. Its 1,312 members operate over 53,000 convenience stores, more than 59 percent of which sell gasoline. Many NACS members also operate as gasoline wholesalers.

The decision below, if left unreviewed, will have a serious adverse impact on the members of NACS and SIGMA. The court of appeals' decision calls into question the legality of a manufacturer's granting class of trade discounts to middlemen in the distribution chain, a longstanding pricing practice that is essential

to the viability of wholesalers and jobbers. As wholesalers, SIGMA and NACS members cannot resell profitably to retailers if manufacturers sell to them at the same prices they charge direct-buying retailers. The decision below held that a class of trade discount may violate the Robinson-Patman Act, 15 U.S.C. § 13(a), if it is not cost-based and if it exceeds the wholesaler's costs of wholesaling. This ruling conflicts with a substantial body of precedent holding that class of trade discounts granted to wholesalers do not violate the Robinson-Patman Act in the absence of direct competition between the wholesalers and direct-buying retailers. Moreover, the cost-based discount regime required by the court of appeals would be utterly impractical and would leave motor fuels refiners no real choice but to sell to all customer classes at the same price, resulting in the elimination of gasoline wholesalers and jobbers.

SIGMA and NACS are more familiar than petitioner Texaco, Inc. with the practical problems raised by the court of appeals' rule requiring precise equivalence between each wholesaler's discount and its costs of wholesaling. Many factors affect a wholesaler's costs of wholesaling and these factors are largely within its control as an independent businessman. A gasoline wholesaler's costs are not known by its suppliers. SIGMA and NACS are better situated than Texaco to say whether their members would be able to develop the detailed daily cost data required by the decision below and share it with their suppliers, which are also their competitors. SIGMA and NACS are also in a better position than Texaco to inform the Court of the effects that the decision below would have on gasoline wholesalers. SIGMA and NACS believe that

the likely result of the decision below will be the elimination of class of trade discounts. With respect, the impact of that development would be more immediately felt, and thus is better understood, by SIGMA and NACS than Texaco.

The proposed brief of SIGMA and NACS is attached.

Respectfully submitted,

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BRIEF OF AMICI CURIAE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Society of Independent Gasoline Marketers of America (SIGMA) and the National Association of Convenience Stores (NACS) respectfully submit this amici curiae brief in support of Texaco, Inc.'s petition for a writ of certiorari.

INTEREST OF AMICI CURIAE

The Society of Independent Gasoline Marketers of America is a national trade association of 297 independent marketers of motor fuels. SIGMA is the principal spokesman for the independent marketing segment of the petroleum industry. SIGMA members sell refined petroleum products in all 50 states through more than 9,800 branded and unbranded retail outlets which they own and operate. In addition, two out of every three SIGMA members operate as wholesalers. SIGMA members supply petroleum products to some 10,400 branded and unbranded retail outlets owned by other companies. In 1986 SIGMA members sold 18.4 billion gallons of motor fuels, which represented approximately 14 percent of all motor fuels sold in the United States.

The National Association of Convenience Stores is the national representative of the convenience store industry. The 1,312 members of NACS operate over 53,000 convenience stores; 59 percent of those stores sell gasoline. In 1987 convenience stores had $20.5 billion in retail gasoline sales. NACS members are

also engaged in gasoline wholesaling, supplying both branded and unbranded outlets owned by other companies.

Wholesalers and jobbers play important roles in the marketing of motor fuels in the United States. Over 50 percent of the gasoline and over 60 percent of the diesel fuel sold at retail in the United States passes through a distributor on its way to the retail outlet.[1] Approximately two-thirds of all gasoline dealers are supplied by wholesalers or jobbers.

The members of NACS and SIGMA are independent marketers. They purchase fuels from the major oil companies, from independent refiners, from jobbers, and on the spot market. The independent marketing segment has been described as "the most competitive factor in the industry at the wholesale and retail levels." *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 383 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

The interest of SIGMA and NACS in this case stems from a simple economic reality: SIGMA and NACS members cannot stay in business as gasoline wholesalers if they are charged the same price as retailers. The major oil companies and the independent refiners, which are the primary sources of supply for SIGMA and NACS members, can and do sell directly to dealers. SIGMA and NACS members could not resell profitably to retail outlets if they were charged the same price as direct-buying dealers, because they must mark up the price in order to cover their costs and make a profit. Thus, in gasoline marketing as in many other

[1] Petroleum Marketers Association of America, *1986 Petroleum Marketing Databook*.

industries it has long been customary for manufacturers to sell at graduated discounts to customers according to their level in the distribution chain, with the distributors at the level nearest the manufacturer paying the lowest price and retailers, who are farthest from the manufacturer, paying the highest price.

The decision below would have an enormous adverse impact on SIGMA and NACS members. The court of appeals held that Section 2(a) of the Robinson-Patman Act, 15 U.S.C.. § 13(a), may be violated if a manufacturer grants a discount to a wholesaler that exceeds the cost of the wholesaling functions it performs. The court of appeals expects manufacturers to comply with its ruling by constantly adjusting the size of each wholesaler's discount so that it matches the wholesaler's costs, but that would be completely impractical. A supplier cannot know each customer's costs. Certainly it is not the practice of SIGMA and NACS members to share their most sensitive day-to-day cost data with their suppliers, with whom they often directly compete.

Since the cost-based discount system envisioned by the court below is unworkable, a manufacturer could avoid Robinson-Patman liability only by monitoring and controlling its wholesalers' resale prices, thereby exposing itself and its customers to Sherman Act liability, or by eliminating class of trade discounts and selling to all classes of trade at the same price. The latter result, which seems the most likely outcome if the decision below stands, would be disastrous for the members of NACS and SIGMA and would also cause severe harm to retail station operators who are supplied by wholesalers and jobbers. Elimination of class of trade discounts would render gasoline wholesalers

and jobbers obsolete and deprive consumers of an important source of competition.

SUMMARY OF THE ARGUMENT

The decision below holds that a manufacturer may violate the Robinson-Patman Act if its price to wholesalers is less than its price to direct-buying retailers. The decision is at odds with Congressional intent and precedent. It is unsound, moreover, as a matter of business practicality and antitrust policy.

1. It would be impossible for manufacturers to tailor each wholesaler's discount to its costs of wholesaling. A manufacturer does not know what these costs are and it is unreasonable to require wholesalers to share distribution cost information with their suppliers, which are frequently their competitors as well.

2. The right of a manufacturer to sell to wholesalers at a uniform lower price than it charges to retailers has been firmly established by the courts and the Federal Trade Commission.

3. In order to ensure that wholesalers did not pass on their discounts to their retailer customers, manufacturers would be required to control wholesalers' resale prices, in violation of Section 1 of the Sherman Act, 15 U.S.C.. § 1.

4. Faced with the risk of violating the Robinson-Patman Act on the one hand and the Sherman Act on the other, manufacturers logically would sell at a uniform price to wholesalers and retailers, which would force wholesalers out of business, harming not only wholesalers but also dealers and consumers.

ARGUMENT

I. THE COURT OF APPEALS' RULE IS IMPRACTICAL AND WOULD REQUIRE DISCRIMINATION AMONG WHOLESALERS

In order to avoid Robinson-Patman violations, the decision below requires manufacturers either to maintain a strict cost/discount equivalency for each customer or to control in some manner wholesalers' resale prices in order to prevent them from passing on the discount.

A pricing scheme in which each wholesaler's discount always precisely matches its costs cannot exist in the real world. Fuel refiners do not and cannot know each wholesaler's costs of wholesaling. Such costs vary from wholesaler to wholesaler and from day to day and are affected by a host of factors within each wholesaler's discretion as an independent businessman. For example, a fuel wholesaler who owns a bulk terminal will have different costs than one who leases a terminal; a wholesaler who transports products in his own trucks will have different costs than one who uses common carriers; and a wholesaler who makes an investment in training a large staff will have different costs than one who does not. Other factors affecting wholesaling costs include: how much and what grades of product are maintained in the wholesaler's inventory; whether and to whom the wholesaler extends credit; and how often deliveries are made. At any given time, moreover, a wholesaler may be selling fuel that came from more than one refiner, making it very nearly impossible to apportion wholesaling costs among the various suppliers.[2]

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[2] The Federal Trade Commission briefly flirted with a rule

Gasoline wholesalers normally do not maintain the detailed daily cost records that would be required to comply with the court of appeals' cost/discount equivalency rule, and even if they did they would be loath to share them with their suppliers. SIGMA and NACS members are in direct competition with the integrated gasoline refiners in selling to retailers and consumers. It is unrealistic, not to mention anticompetitive, to require SIGMA and NACS members to share the most intimate details of their operating costs with their competitors.

Even if a manufacturer could know each wholesaler's costs and adjust its price to the wholesaler accordingly, sales to competing wholesalers at different prices would themselves be actionable discrimi-

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that would have limited the size of permissible wholesale discounts to the wholesaler's costs, Doubleday & Co., 52 F.T.C. 169 (1955), but it soon rejected that approach. Mueller Co., 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). The Commission emphasized the impracticability of such a rule in its *Boise Cascade* decision:

> "The costs of the manufacturer's customers in performing certain functions will surely vary, depending on differences in customer operations, efficiency, location, and product mix. . . . A manufacturer almost certainly could not know in detail each customer's costs to perform certain functions. Granting the different discounts based on guesses about individual customer costs could easily lead to discriminatory prices. Even if the discounts accurately reflected each customer's costs, under any variable discount system the less efficient firms with higher costs would receive higher discounts—an economically unfortunate reversal of desired incentives."

Boise Cascade Corp., 107 F.T.C. 76, 212 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988) (footnote omitted).

nations under Section 2(a). The statutory cost justification defense would not absolve such discriminations, since that defense must be based on differences in the manufacturer's costs, not the customers' costs. *See Boise Cascade Corp.*, 107 F.T.C. 76, 212 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). The court below thus requires manufacturers to risk liability for discriminating among wholesalers in order to avoid liability for discriminating at the retailer level under its novel interpretation of the Act.

II. DISCOUNTS BASED ON THE CUSTOMER'S LEVEL OF TRADE DO NOT VIOLATE SECTION 2(a)

Discounts based on the customer's level of resale have been a characteristic feature of American commerce since the turn of the century, if not earlier. *See* F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 3-6 (1962). Such discounts are a traditional means by which suppliers reward customers for assuming the burdens of storing and distributing their products and providing service to accounts at lower levels. Practical economics, moreover, require that wholesalers and jobbers pay a lower price than retailers, because middlemen must mark up the price in order to cover their expenses and earn a profit.

Independent wholesalers, who felt threatened by what were perceived as undeserved discounts granted to powerful direct-buying retailers, provided the primary impetus for the passage of the Robinson-Patman Act.[3] The Act's unmistakable purpose was to protect

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[3] The original Patman bill was written and shepherded through Congress by the counsel for the United States Wholesale Grocers

wholesalers and small retailers and to preserve the then-existing multi-tiered products distribution system. Not surprisingly, nothing in the text or legislative history of the Act supports the view that Congress intended radically to overhaul the economy by outlawing traditional class of trade discounts.

It is well established that a discount given to wholesalers but not to retailers does not violate the Act regardless of its size because of the absence of competition between the recipients of the higher and lower prices. As the Federal Trade Commission has stated:

> "Over the years in the chain of distribution from the producer to the ultimate consumer, various groups have come into being, each having a particular status and performing its particular function. Familiar examples are wholesalers and retailers. Prices to these groups take into account their status and the part they play in distribution by virtue of that status. Characteristically, the members of each group compete with each other but not with members of a different group."
>
> "While the Robinson-Patman Act does not mention functional pricing, it was written nevertheless against the background of the distribution system then in effect. As pointed out by respondent, a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result."

Association, with assistance from drug wholesalers and the National Food Brokers' Association. J. Palamountain, *The Politics of Distribution* 197-203 (1955).

General Foods Corp., 52 F.T.C. 798, 824 (1956). Injury to competition could result, the Commission went on to say, if customers nominally in different functional classes were in direct resale competition. *Id.* at 824-25. The Commission has reiterated the legality of a manufacturer's selling at lower prices to wholesalers than to noncompeting retailers in numerous decisions, most recently *Boise Cascade Corp.*, 107 F.T.C. 76, 199, 214-15 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). Other decisions confirming the legality of charging lower prices to wholesalers than to retailers include *White Industries, Inc. v. Cessna Aircraft Co.*, 1988-1 Trade Cas. (CCH) ¶ 67,992 (8th Cir. 1988); *Dart Industries, Inc. v. Plunkett Co. of Oklahoma, Inc.*, 704 F.2d 496, 499-500 (10th Cir. 1983); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Energex Lighting Industries, Inc. v. North American Phillips Lighting Corp.*, 656 F. Supp. 914, 919-20 (S.D.N.Y. 1987); and *Roorda v. American Oil Co.*, 1981-1 Trade Cas. (CCH) ¶ 64,153, at 76,911 (W.D.N.Y. 1981).

Where a manufacturer uses a controlled wholesaler to funnel discriminatory prices to retailers, the courts and the Commission have used the "indirect purchaser" doctrine to hold the manufacturer responsible for injuries suffered by disfavored retailers. *See, e.g., Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 83-84 (6th Cir. 1981). Application of the indirect purchaser doctrine has been carefully limited, however, to situations where the manufacturer dictates the

terms of the transaction between the wholesaler and the retailer, for "[i]f the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition." *Purolator Products, Inc. v. FTC*, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968).[4]

The court below did not, and could not, apply the indirect purchaser doctrine on the record before it. In a remarkable break with precedent, the court held that the absence of direct competition between wholesalers and retailers was irrelevant if it was "foreseeable" that wholesalers, in their independent pricing decisions, would pass on part of the discount to their customers. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir. 1988). This approach would accomplish something Congress clearly did not intend: the abolition of class of trade discounts.[5]

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[4] In his 1976 monograph on the Act, then-Professor Richard Posner noted the clear legality of class of trade discounts except where the requirements of the indirect purchaser doctrine are met:

> "Section 2(a) is also limited in its terms to a discrimination between *purchasers* from the seller. . . . For example, a seller might be selling the same product (1) directly to a retailer and (2) to a wholesaler reselling to a retailer who is in competition with the direct-buying retailer. If there is discrimination between the two retailers, it is actionable under the statute only if the retailer purchasing through the wholesaler may somehow be deemed an indirect purchaser from the seller."

R. Posner, *The Robinson-Patman Act* 36 (1976) (emphasis in original).

[5] The only decision indicating that class of trade discounts could violate the Act is Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949). There, the court of appeals modified and affirmed an order which included a provision that prevented Standard Oil from selling to jobbers at a discount if it knew the discount would be passed on, enabling the jobbers' customers to undercut direct-buying dealers. The order ultimately was vacated on the ground that the meeting competition defense had been established. 340 U.S. 231 (1951), *on remand*, 49 F.T.C. 923 (1953), *rev'd*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1958). The government eventually recognized that the order required Standard Oil to engage in resale price maintenance and it repudiated the resale price maintenance provision when the case reached the Court for the second time. FTC Reply Brief at 31-32, FTC v. Standard Oil Co., 355 U.S. 396 (1958). The order was criticized by the 1955 Attorney General's Committee To Study The Antitrust Laws. The Committee pointed out that it "contradicts basic antitrust policy" to make a manufacturer responsible for the resale prices of its independent distributor. *Report Of Att'y General's Nat'l Comm. To Study The Antitrust Laws* 206 (1955).

III. THE DECISION BELOW IS INCONSISTENT WITH THE PER SE BAN AGAINST RESALE PRICE MAINTENANCE

The decision below allows treble damage liability to be imposed on manufacturers for injuries caused by the independent pricing decisions of their wholesaler customers. Since it is impossible for manufacturers to know their wholesalers' costs, a manufacturer that wishes to grant discounts to wholesalers can be safe from liability under the decision below only if it can find another way to prevent the discount from being passed on. If class of trade discounts granted to independent wholesalers are deemed capable of unlawfully injuring direct-buying retailers, "the inevitable Robinson-Patman remedy (short of outright elimination of intermediate distributors whenever direct sales are also made) must be the supplier's control of [the

wholesaler's] resale price." F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 204 (1962).

Resale price maintenance agreements are illegal *per se*, *Business Electronics Corp. v. Sharp Electronics Corp.*, ___ U.S. ___, 108 S.Ct. 1515, 1519 (1988); thus, it is out of the question for manufacturers to grant discounts to wholesalers on the condition that the wholesalers not charge their customers less than the manufacturer charges direct-buying retailers. Less direct means of controlling wholesalers' resale prices would also entail serious Sherman Act risks. The existence of a resale price maintenance conspiracy may be inferred from evidence that a manufacturer disciplined customers whose resale prices were too low by raising its price to them. *See Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 37-41 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) (resale price maintenance agreement established by denial of competitive allowance in retaliation for customer's failure to adhere to suggested resale prices); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) (withdrawal of rebate when customer deviated from suggested resale prices was unlawful coercion). Surveillance or monitoring of wholesalers' resale prices could support an inference of resale price maintenance,[6] and

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[6] *See, e.g.*, Bender v. Southland Corp., 749 F.2d 1205, 1212-1213 (6th Cir. 1984) (franchisor's requirement that franchisees report unchanged actual retail prices whenever suggested retail prices changed would be basis for inferring resale price maintenance agreement); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 716 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969) (manufacturer requests for reports on sales below suggested prices); *cf.* Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 393 (7th Cir. 1984) ("[s]urveillance could in some circumstances. . . be the stick that forced dealers into a tacit understanding" that they would not buy from competing suppliers).

evidence that actual or threatened termination was used to secure wholesalers' adherence to a particular resale price floor could also lead to Section 1 liability.[7]

In making manufacturers responsible for independent wholesalers' pricing decisions, the decision below exposes manufacturers and wholesalers to grave risks under the Sherman Act. It would be hard to blame a manufacturer which decided to eliminate wholesaler discounts or which stopped selling to wholesalers altogether rather than cross the Sherman Act minefield laid down by the court of appeals.

IV. ELIMINATION OF CLASS OF TRADE DISCOUNTS WOULD HARM COMPETITION AND CONSUMERS

The multi-tiered gasoline pricing system as it currently exists in the United States makes it possible for independent gasoline marketers to compete aggressively with the major, vertically integrated oil companies and gives retail station operators sources of supply other than the major oil companies and refineries. The members of SIGMA and NACS are industry leaders in efficiency, innovation, and cost-cutting, but they cannot operate as wholesalers if they must pay the same prices as retailers. The lower court's ruling leaves no practical or safe means for suppliers to grant class of trade discounts to wholesalers and jobbers and thus would result in a single price being charged to all customers regardless of their level in the distribution chain. There would be

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[7] *See* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 765-67 (1984).

no place for gasoline wholesalers and jobbers in a single-price system. The irony of this outcome, given the Act's origins as a bill to ensure the continued existence of wholesalers, should be apparent.

Dealers and consumers would be the real losers if the decision below stands. Retail station operators depend heavily on wholesalers and jobbers for supplies of fuel at competitive prices and independent marketers provide strong wholesale and retail price competition for the major oil companies.[8] If wholesalers and jobbers were charged the same prices as direct-buying dealers, they could not supply dealers at prices that would enable them to compete with direct-supplied outlets and thus could not stay in business. The elimination of independent gasoline wholesalers would mean fewer choices and higher prices for consumers and retail dealers.

CONCLUSION

For all the reasons set forth above, SIGMA and NACS urge that Texaco's petition for a writ of certiorari be granted.

[8] *See generally Report of the Federal Trade Commission on Mergers in the Petroleum Industry* 287-90 (1982).

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Dated: July 14, 1988

No. 87-2048 (6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TEXACO INC.,
Petitioner,
v.

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN PETROLEUM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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July 15, 1988

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MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN PETROLEUM INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The National Association of Manufacturers of the United States of America ("NAM"), and the American Petroleum Institute ("API") hereby seek leave, under Rule 36.1 of the Rules of this Court, to file the accompanying brief as *amici curiae* in support of the petition by Texaco Inc. ("Texaco") for the issuance of a writ of certiorari to the Court of Appeals for the Ninth Circuit to review its *Hasbrouck* decision. NAM and API are compelled to make this application as only petitioner consented to their

participation as *amici curiae*; respondents, through their counsel, refused such consent.

NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. NAM represents some 13,000 companies located throughout the nation's fifty states, providing 85 percent of this country's manufacturing employment. NAM businesses account for fully 80 percent of all domestically manufactured goods. NAM is likewise affiliated with 158,000 additional businesses through its relationship with the Associations Council and the National Industrial Council.

API, a District of Columbia corporation, is likewise a national trade association. It counts over 200 companies among its membership representing all facets of the petroleum industry: exploration, production, transportation, refining, and marketing. Many of API's members are involved in marketing at both the wholesale and retail levels.

As a principal spokesman for America's manufacturing community, NAM has had a long history of interest and involvement in matters affecting marketing and distribution. In that role, NAM has participated repeatedly as *amicus curiae* before this Court on issues critical to the nation's industry. So too, API has routinely participated on its industry's behalf in legislative, administrative, and judicial proceedings which present issues of national concern. NAM and API believe that the Ninth Circuit's *Hasbrouck* decision presents just such an issue.

The decision below declares that it is unlawful for a seller to charge a legitimately classified single-function wholesaler less than a direct-purchasing retailer even though there is no competition between functional levels. In so ruling, the Ninth Circuit casts doubt on the legality of the customary and widespread practice of granting wholesalers a discount in compensation for their performing distributive functions. Under *Hasbrouck*, manufacturers and suppliers that maintain dual channel distribution, *i.e.*, that sell to both wholesaling distributors and retail dealers, are now subject to the threat of treble damages.

Plainly, the implications of the *Hasbrouck* panel's opinion go far beyond the specific dispute between the parties here to encompass questions that affect the marketing and distribution not just of gasoline or petroleum products in Spokane, Washington but of all goods and commodities for sale throughout the nation. By condemning the wholesaler discounts in *Hasbrouck* as price discrimination, the Ninth Circuit raises fundamental questions for all manufacturers and suppliers about whether any such practices can be continued consistent with the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(b), and 21(a) (1982 & Supp. IV 1986) (the "Act"). Moreover, as that decision is in conflict with those of other Courts of Appeal that have passed on the matter, manufacturers and suppliers throughout the United States may now be subject to differing and inconsistent standards of commercial conduct.

The memberships of both NAM and API have a vital interest in this Court's review of the *Hasbrouck* decision because many of them employ discounts in dual channel distribution systems to compensate for the wholesaling function. Likewise, many of the companies represented by API and NAM do business throughout the nation and in all the judicial circuits. These businesses need a uniform Robinson-Patman Act interpretation that only a decision by this Court can provide.

Moreover, NAM and API believe their participation as *amici curiae* on the issue of certiorari will not only serve to provide this Court with a uniquely broader perspective on the questions raised by Texaco's petition but will bring into focus the national significance of the distribution issue at the heart of this case and thereby under-

score the critical need for this Court's review of the decision below. Accordingly, NAM and API urge that leave be granted for the filing of their brief.

Dated: July 15, 1988

Respectfully submitted,

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QUESTION PRESENTED

Can the trade discounts customarily accorded by manufacturers and suppliers that permit wholesalers to pay less than direct-purchasing retailers ever be the basis for a Robinson-Patman Act price discrimination claim by a retail customer of a supplier when the challenged discounts are uniform and nondiscriminatorily available to all competing wholesalers?

The court below answered this question in the affirmative, holding that functional discounts are presumptively unlawful unless they are limited to the cost incurred by each wholesaler in the performance of distributive functions, or unless no part of the discount is passed through to retailers who might thereby be favored over competing direct purchasing retailers.

In so holding, the Ninth Circuit upended decades of Robinson-Patman Act learning to the effect that, in such circumstances, there is neither discrimination nor competitive injury. The court below insisted instead that the Act countenances only an unworkable regime, mandating discounts that discriminate among wholesalers on the basis of their respective costs—something a manufacturer would have no way of knowing—and requiring, in conflict with the dictates of the Sherman Act, that a supplier police the pricing decisions of its wholesalers to ensure that no portion of any wholesale discount is passed down the distributive chain.

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN PETROLEUM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF THE CASE

The facts relevant to this Court's consideration of the certiorari petition are simple and few:

During the period 1972 to 1981, the respondents, twelve owners of retail service stations located in the Spokane, Washington area, purchased gasoline directly from petitioner Texaco Inc. for resale to the motoring public under the Texaco brand name. Contemporaneously,

Texaco also sold its gasoline to John Dompier Oil Company and Gull Oil Company, two Spokane-based independent wholesalers. Texaco charged them the discounted price it charged all wholesalers, which was lower than the price Texaco charged its direct purchasing Spokane area retailers, such as plaintiffs. Dompier and Gull, in turn, sold the Texaco gasoline to independent retail service stations, some of which competed with plaintiffs.

The plaintiff direct-served retailers claimed that they were injured by Texaco's grant of a uniformly available wholesale discount to Dompier, because that distributor, from time to time, independently decided to pass on some portion of that discount to the service station customers which were in competition with the plaintiffs.[1] This, plaintiffs charged, resulted not only in their competitors being charged a lower price for gasoline than Texaco charged them but also permitted those retailers supplied by Dompier to pass some of their savings on to the consuming public. Plaintiffs alleged that, as a consequence, they lost sales that they otherwise would have made to Washington state mortists.

Plaintiffs argued that the competitive disadvantage to which they were subjected by virtue of Texaco's trade discount rendered the difference in price charged wholesalers and retailers actionable as "price discrimination" under section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982 and Supp. IV 1986) and that the resulting lost sales were tantamount to the "competitive

[1] As Gull did not sell gasoline under the Texaco brand, plaintiffs did not seek damages from Texaco's grant of a wholesale discount to Gull. A-5; B-15; ER 386; 424-45. While Dompier, during the latter part of the period for which damages were sought, acquired some retail outlets, the case appears to have been tried and decided on the premise that Dompier was a properly classified single-function wholesaler. ER 529-30.

injury" proscribed by that statute. Plaintiffs urged that, though Texaco exercised no control over either the pricing decisions of its independent wholesalers or the subsequent pricing determinations made by customers of Dompier, Texaco should nonetheless be responsible in damages for what plaintiffs charged was a tertiary line violation of the Act.[2]

Texaco defended itself by proving that it sold to all wholesalers at the same uniform price and that its wholesale discount was available to all distributors. A-7. It disavowed any control over the prices at which Gull and Dompier resold gasoline and likewise disowned any influence over the prices at which the service stations that were customers of Dompier and Gull sold gasoline to the consuming public. A-15 n8. Plaintiffs challenged none of this.

Confronted with a classic trade discount, the Ninth Circuit began its analysis correctly by observing:

> Manufacturers are permitted to use price differentials, commonly known as wholesale or functional discounts, to compensate certain classes of buyers for the distributional services they perform [citations omitted]. For this reason, goods may generally be sold to wholesalers at a lower price than that charged [by manufacturers or suppliers] to retailers.

A-7.

[2] Courts have come to classify Robinson-Patman Act cases on the basis of the functional level of the distribution chain on which the competitive effects are felt and the injury claimed. Thus, if a manufacturer or supplier, by price discrimination, attracts the custom of its business rival, which thereafter sues, the claim against the seller is one for a "primary line" violation. If the competitor of a favored purchaser sues the offending seller, the case is a "secondary line" claim. Injury suffered by those competing with the customer of a favored purchaser occurs at the "tertiary line." *See* Guyott Co. v. Texaco Inc., 261 F. Supp. 942, 949 (D. Conn. 1966).

The court below likewise acknowledged:

> We recognize that, generally, selling at different prices to customers who are at different levels of distribution will not constitute a violation of the Robinson-Patman Act [citations omitted].

A-9.

The *Hasbrouck* panel nonetheless held that the lower prices that Texaco charged Gull and Dompier constituted unlawful price discrimination because those prices were "functional discount[s] in excess of the value of the services [Gull and Dompier] perform, all or a portion of which [those wholesalers] then pass on to the retailers they supply." A-7, A-8. The Ninth Circuit thus declared that even though a wholesale discount is uniform and nondiscriminatorily available to all middlemen, and there is no competition between retailers and wholesalers, a seller's lower price to a pure single-function wholesaler is still unlawful if it is not "cost-based" and if any part is "passed on" to customers who compete with a direct-purchasing retailer. A-8.

Having thus found price discrimination, the Ninth Circuit then went on to hold Texaco liable for the independent pricing decisions of both its wholesalers, Gull and Dompier, and the retail service stations who were their customers. Acknowledging that Texaco could not, under the Sherman Act, dictate resale prices, the court below nevertheless held that, "as a matter of law," the Act required that a manufacturer be held responsible for the consequences of decisions by others that is legally incapable of controlling. As support for this singular proposition, the *Hasbrouck* panel argued that were it otherwise "[t]hat view would preclude all Robinson-Patman claims involving secondary and tertiary line injury. . . ." A-15, n8. In the view of the court below, all that was required to impose such vicarious liability was an "inference" that the claimed harm had "flowed" from the original wrong and that the prohibited discount was a "material cause" of the injury claimed. A-13, A-14.

SUMMARY OF ARGUMENT

The Ninth Circuit's *Hasbrouck* decision adopts the novel position that traditional trade discounts allowing wholesalers to pay less than direct-purchasing retailers are a violation of that Act's prohibition on price discrimination. In so ruling, the Ninth Circuit may well have erected a standard of conduct in conflict with that maintained by other appeals courts as well as the Federal Trade Commission, the agency charged with the Act's principal enforcement responsibility. The *Hasbrouck* panel has not only upset settled notions of law but has also thereby exposed a majority of America's manufacturers and suppliers to treble damages for what has long been regarded as a customary and legitimate way of doing business.

In the contrary view of the Ninth Circuit, it appears that a manufacturer may not charge a wholesaler a lower price than a direct-purchasing retailer—even though they do not compete—unless the challenged discount is equal to no more than the cost incurred by that wholesaler in performing its distributive function or unless no portion of that discount is passed on to the retail level.

In so holding, the court below seems to require that the legality of a wholesale discount be determined by something a manufacturer can have no way of knowing: the precise costs incurred by each individual wholesaler with which it deals. So too, in contradiction to the Act's goal that all competitors be treated alike, the decision mandates that a manufacturer custom tailor discounts to each individual wholesaler, thus discriminating between and among competitors. The Ninth Circuit's decision also requires, to ensure the legality of a wholesale discount, that the manufacturer or supplier police the pricing decisions of the independent wholesalers with which it deals to make certain that no portion of the discount is passed on to the retail level, lest direct-purchasing retailers have

a tertiary line price discrimination claim under the Act. This, of course, invites a resale price maintenance violation of the Sherman Act, 15 U.S.C. §§ 1-7 (1982 & Supp. IV 1986).

The Ninth Circuit's ruling is as unmanageable as it is unrealistic. It threatens traditional patterns of distribution and makes law-abiding manufacturers liable for the independent business decisions of others over whom they exercise no control. Under the *Hasbrouck* panel's marketing regime, a manufacturer that sells directly to retailers will be taking a considered risk in dealing with a wholesaler. A supplier will have to consider the benefits of confining its sales activity to either the wholesale or retail level. Similarly, as no wholesale discount can exceed the costs incurred by a distributor in performing its function, there is no margin of profit for the wholesaler. The net effect is to deter, if not make impossible, the use of independent local businesses as distributors and, for larger suppliers, to encourage vertical integration into wholesaling. Such enterprises exist because of the economies they provide manufacturers in the marketing of their products. The *Hasbrouck* decision will be particularly burdensome for smaller suppliers who cannot integrate the distributive function. The Ninth Circuit's decision hence encourages inefficiency and, in derogation of one of the principal aims of the antitrust laws, diminishes consumer welfare.

None of this is compelled by the Robinson-Patman Act. The Ninth Circuit's unprecedented decision is faithless to the statutory intent of the Act's draftsmen. Equally so, that decision is irreconcilable with the dictates of the Sherman Act. The Ninth Circuit's erroneous decision is premised on a fundamental misapplication of three of this Court's decisions. Review by this Court is essential not merely to correct what is an obviously improvident decision, but more important, to validate once again a long-standing, widely-accepted marketing practice fol-

lowed by a majority of the nation's manufacturers. Only this Court's precedent can restore the uniformity of decision demanded by interstate commerce and provide the clarity lacking in an area of law now thoroughly confused and in disarray.

REASONS FOR GRANTING THE WRIT

A. If *Hasbrouck* Had Been Tried In Another Circuit, It Might Well Have Been Decided Differently.

The *Hasbrouck* decision is unprecedented and threatens to undermine perhaps the most common distributional arrangement in American business: the dual channel system in which a manufacturer or supplier sells to wholesalers at discounted prices lower than those it charges direct purchasing retailers. Until the decision below, it had been an article of faith that no actionable competitive injury, within the meaning of the Robinson-Patman Act could result, when a manufacturer or supplier charged two different prices to purchasers who operated entirely at different levels of resale distribution so long as all competing purchasers on the same level were treated alike and the greater discount was accorded on a uniform, nondiscriminatory basis to a buyer higher up the distributive chain.

Functional discounts have been a part of our economy since long before the 1936 enactment of the Robinson-Patman Act. *See Boise Cascade Corp.*, [1983-1987 FTC Complaints and Orders transfer binder] Trade Reg. Rep. (CCH) ¶ 22,330 at 22,399-400 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988).

Time and time again, when the courts have been called upon to assay the lawfulness of this practice in cases involving the claimed discrimination in the prices charged by a seller to two customers performing different functions, they have confirmed its fundamental legality. *E.g.*, the Fifth Circuit: *Eximco, Inc. v. Trane Co.*, 737 F.2d 505,

515 (5th Cir. 1984) (to make out a price discrimination claim there must be "a sale to two different buyers *at the same functional level* of competition, charging different prices to each") (emphasis added); the Seventh Circuit: *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984) (as "neither the company's own dealers nor those dealers' ultimate purchasers are competing purchasers vis a vis independent dealers like plaintiffs . . . the Robinson-Patman Act is inapplicable"); and, the Tenth Circuit: *Dart Indus., Inc. v. Plunkett Co. of Oklahoma*, 704 F.2d 496, 499 (10th Cir. 1983) (in the absence of competition, "[t]he difference in the prices charged to Plunkett [a distributor] and those charged to direct [retail dealer] accounts such as Oklahoma Fixtures do not constitute a Robinson-Patman violation.").

The most recently reported Court of Appeals decision to consider the propriety of functional discounts for single-function wholesalers underscores the exceptional nature of the *Hasbrouck* panel's decision:

> [T]o hold that [grant of a] distributors' discount [larger than that available to a dealer] violates § 2(a) in this circumstance would effectively abolish two channel distribution systems in all industries [footnote omitted]. [Plaintiff] cites no authority for this extraordinary interpretation of the Act, nor can we find any.

White Indus., Inc. v. Cessna Aircraft Co., 1988-1 Trade Cas. (CCH) ¶ 67,992 at 58,086 (8th Cir. 1988).

The Ninth Circuit's *Hasbrouck* decision did more, however, than merely challenge the long-standing and well-settled view that trade discounts accorded single-function wholesalers are not prohibited by the Robinson-Patman Act. That court also appears to have declared that functional discounts are presumptively unlawful unless they are limited to the cost incurred by each wholesaler in the performance of distributive functions, or permissible only

so long as no part of the discount is passed through to retailers. A-9, A-10. In so holding, the court below announced a rule that mandates that manufacturers and suppliers who wish to compensate wholesalers for their distributive activity must discriminate between and among competing purchasers at that functional level on the basis of the costs each incurs.

Leaving aside that no manufacturer or supplier could ever know and be able to quantify the precise distributive costs actually shouldered by each of its wholesalers, the resulting regime of disparate treatment would plainly violate the Act. *See Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *White Indus. Inc. v. Cessna*, 1988-1 Trade Cas. (CCH) at 58,086 n4. As this Court explained in *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963), the purpose of the Robinson-Patman Act is "to assure, to the extent reasonably practical, that businessmen at the same functional level would start on equal competitive footing so far as price was concerned."

Equally remarkable is the *Hasbrouck* panel's suggestion that sellers may have to police the resale prices of their wholesalers to ensure that no part of a distributor's discount is passed on to the next level. Any such attempt by a manufacturer would surely subject it to claims of resale price maintenance. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44, 46-47 (1960). And, attempted compliance with the Robinson-Patman Act would not be accepted as a defense. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 458-59 (1978).

The Ninth Circuit's ruling leaves thousands of businesses subject to what appear conflicting standards of conduct and without the necessary assurance that a distributor's marketing activity can be acknowledged through the use of wholesale discounts. Review by this Court is essential to assure uniformity as well as to pro-

vide needed guidance to the business community. As the *Boise Cascade* panel noted:

> [T]he uncertain status of functional discounting is primarily due to the failure of Congress, the Federal Trade Commission, and the courts to give explicit and independent recognition to the practice and to define with any modicum of specificity its permissible contours. The result of this failure of recognition has been a lack of focus upon the validity of the functional discount which, in turn, has left the law in a state of confusion, causing often legitimate practices to be condemned.

837 F.2d at 1140 (quoting Calvani, Functional Discounts Under the Robinson-Patman Act, 17 Boston C. Indus. & Com.L.Rev. 542, 542-44 (1976)).

B. The *Hasbrouck* Decision Raises A Critical Question Of National Economic Policy. If Allowed To Stand, It Imperils The Continued Use Of Dual Channel Distribution By Manufacturers And Threatens This Country's Markets With Otherwise Unnecessary Distributional Inefficiencies.

Underlying the decision of the court below is a fundamental misunderstanding of the role that wholesaler discounts play in a dual channel distribution system. The challenged discounts are not merely designed to offset the costs of performing distributive functions that cannot be expected of direct purchasing retailers. Their purpose is also to attract enterprises as middlemen that, for a reasonable return, will perform these distributive functions, often including marketing, more effectively and more efficiently than could the manufacturer or supplier by integrating those functions into its own operation. Indeed, many smaller suppliers simply lack the resources to integrate distributive functions and, thus, must rely on middlemen. The decision of the court below poses a serious threat to the businesses of these smaller suppliers.

By insisting that wholesale discounts not exceed the costs actually incurred by a particular wholesaler in the performance of distributive functions, the *Hasbrouck* decision eliminates any return for the risks assumed and any reward for the marketing effort undertaken. Surely, under such a regime, where all the profit is reserved to direct-purchasing retailers, no business would willingly become a middleman. As such middlemen would not exist in dual channel systems unless they could perform the distribution of a product more efficiently than its manufacturer or supplier, *Hasbrouck's* rule, which tends to eliminate these wholesalers, must perforce result in less efficient distribution.

Yet another unanticipated effect of the *Hasbrouck* decision is that it tends to discourage the formation and continuation of small independent businesses concentrating on distribution and to encourage vertical integration forward into the distribution chain by manufacturers. Mandating such consequences as a result of the Robinson-Patman Act doubtless would shock the Act's draftsmen who were motivated by the desire to protect small business against predatory concentrations of power. *See* U.S. Dept. of Justice, Report on the Robinson-Patman Act, 101-39 (1977).

Perhaps the most immediate consequence of the *Hasbrouck* decision is to make the use by a manufacturer or supplier of a dual channel distribution system too risky to be continued. Because a manufacturer has no way of knowing with precision the exact distributive costs incurred by each of its wholesalers, it could not effectively administer any but the most nominal discounts with the assurance that they would meet *Hasbrouck's* cost-based test. *See* A-7, A-8. Moreover, even if a manufacturer possessed the ability to design for each of its wholesalers discounts that avoided the Ninth Circuit's condemnation, the discrimination inherent in such pricing

would subject its architect to Robinson-Patman Act liability.[3]

In addition to the risks *Hasbrouck* imparts to setting wholesale discounts, that decision also mandates that manufacturers take the risk of policing the pricing decisions of discount recipients to ensure that no part of the discounts is passed on down to the retail level. Leaving aside whether it is fair to make manufacturers and suppliers liable for the acts of those over which they exercise no control, this *Hasbrouck* directive effectively exchanges the risk of price discrimination liability under the Robinson-Patman Act for treble damage exposure under the Sherman Act for resale price maintenance. *See Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

In the face of these multiple risks created by the *Hasbrouck* decision, certain compliance with the Robinson-Patman Act could be assured only by a manufacturer's discontinuing its dual channel and confining sales to distributors or integrating forward into the distribution chain and thereby internalizing the wholesaling function. The consequence of such a reordering of distribution in this country promises the introduction of substantial distributional inefficiencies in our economy and the reduction of consumer welfare.

The untoward consequences of the *Hasbrouck* decision cannot be squared with either the anti-discrimination

[3] Under this Court's *Anheuser-Busch* decision, "a price *discrimination* within the meaning of . . . [the § 2(a) phrase "discriminate in price"] is merely a price *difference*." FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960) (emphasis supplied). While this Court went on to point out that not all price differentials are *illegal* under Section 2(a), since there are other elements to the violation, as well as various defenses available, 363 U.S. at 553, the differential discounts apparently required under the Ninth Circuit's *Hasbrouck* formulation would set up one of the elements of a prima facie Section 2(a) violation, leaving sellers that grant them with the burden of proving a defense.

aims of the Robinson-Patman Act or with the consumer welfare maximization goals of the other antitrust laws. The Ninth Circuit's *Hasbrouck* decision represents a serious departure from the national economic policy embodied in the antitrust laws that this Court must now correct.

C. The *Hasbrouck* Decision Rests On A Misreading Of The Precedents Of This Court.

In support of its singular interpretation of the Robinson-Patman Act, the Ninth Circuit summoned (A-8) but three case citations: *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); and *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969). None of these cases lends precedential support to *Hasbrouck*.

In *Morton Salt*, the FTC attacked two forms of price discrimination. The first was Morton Salt's practice of charging competing wholesalers different prices; a traditional violation of the Act. The second practice at issue was Morton Salt's charging certain large grocery chainstore retailers less than the prices charged wholesalers who sold to the favored retailers' competitors. 334 U.S. at 41. Neither was at issue in *Hasbrouck*.

In fact, Texaco was found liable below for doing exactly the opposite of what Morton Salt had done. Unlike Morton Salt, Texaco treated all competing wholesalers alike. Indeed, it treated all purchasers, at each functional level, alike. Similarly, unlike Morton Salt, Texaco sold to wholesalers at prices uniformly lower than those charged to retailers.

The difference is significant. While charging a wholesaler less than a retailer involves no necessary competitive injury, the converse has a different impact. Granting a retailer a discount greater than that available to a wholesaler adversely affects the ability of the retail

customers of the disadvantaged distributor to compete with the favored retailer. Moreover, that result is foreordained by the pricing decision of the seller, regardless of the wholesaler's pricing.

In contrast, where a wholesaler is charged less than a direct-purchasing retailer, any effect on the ability of that independent distributor's retail customers to compete is attributable solely to the charge made by that wholesaler—a resale pricing decision that, as a matter of law, the seller cannot control and for which it therefore should not be liable.[4] *Morton Salt*, properly read, lends no support to the *Hasbrouck* panel's interpretation of the Robinson-Patman Act.

Nor can the *Hasbrouck* panel find support in this Court's opinion in *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). The *Hasbrouck* court cites *Falls City* for its statement that:

> the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and disfavored purchaser; it also encompasses the injury to competition between their customers . . . .

460 U.S. at 436.

But the *Hasbrouck* panel overlooks the factual context in which this Court made the indicated remark. In *Falls City*, the defendant had charged different prices

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[4] *See* Barnosky Oils, Inc. v. Union Oil Co., 665 F.2d 74 (6th Cir. 1981):

> if the seller controls the sale, he is responsible for the discrimination in the sale price . . . . If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition.

Id. at 83-84 (quoting Purolator Prods., Inc. v. FTC, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968)).

to two wholesalers at the same functional level. Owing to the state liquor laws, the two purchasers, which were located in the adjoining states of Indiana and Kentucky, could not compete; one was restricted to selling to Indiana retailers, the other to Kentucky retailers. But, there was an interstate retail market and their respective customers could and did compete with one another. Hence, injury to those customers was cognizable under the Act to the extent it could be proved attributable to the seller's price discrimination at the wholesale level. 460 U.S. at 437. This, in no way suggests, as the Ninth Circuit appears to believe, that wholesale discounts are no longer lawful.

Perkins v. Standard Oil Co., 395 U.S. 642 (1969) is similarly inapposite. In the peculiar facts of that case, unlike this one, the favored purchaser controlled its resellers and retailers. *Id.* at 645. Thus, as in traditional secondary line injury cases, the disfavored purchaser could prove that the favored customer gained a competitive advantage by receiving a wholesaler's discount on products it actually sold as a retailer. *Id.* at 647-48.

The *Hasbrouck* interpretation of the Robinson-Patman Act is premised on a misreading of this Court's decisions and is, in fact, bereft of precedential support.

CONCLUSION

The Ninth Circuit's manifestly erroneous *Hasbrouck* decision, if not corrected by this Court, will cast doubt on the dual channel distribution practices of countless businesses throughout this nation. Unless this Court acts, the conflict created within the judicial circuits by *Hasbrouck's* perverse result will leave this country's manufacturers and suppliers subject to inconsistent and irreconcilable dictates regarding the legitimacy of extending trade discounts to single-function wholesalers. More

serious still, unless reversed by this Court, *Hasbrouck* has the very real potential of saddling our economy with unwarranted and needless inefficiencies that are in no way compelled by any rule of law. To address these nationally significant issues, this Court should grant the petition.

Dated: July 15, 1988

Respectfully submitted,

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No. 87-2048 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

-vs.-

RICKY HASBROUCK, d/b/a
RICK'S TEXACO, et al.,

Respondents.

RESPONDENTS' RESPONSE TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE IN SUPPORT OF TEXACO'S PETITION FOR WRIT OF CERTIORARI

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Several trade organizations have moved for leave to file briefs as amici curiae in support of Texaco's Petition for Writ of Certiorari. Respondents respectfully

submit this brief in response to those motions.[1/]

Motions for leave to file _amicus_ briefs in support of petitions for writs of certiorari are not favored. Sup. Ct. R. 36.1. Even when a motion to participate as _amicus_ is made after the Court has granted a certiorari petition, an applicant for _amicus_ _curiae_ status must establish that he will set forth relevant facts or questions of law which have not been or will not be adequately presented by the parties. Sup. Ct. R. 36.3.

Here the Applicants are organizations which have interests identical to those of

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1/ Motions were filed by the Society of Independent Gasoline Marketers of America, the National Association of Convenience Stores, the National Association of Manufacturers, the American Petroleum Institute, the National Association of Texaco Wholesalers, and the Petroleum Marketers Association of America. The moving parties are referred to herein as "Applicants."

the petitioner, Texaco, Inc. They seek to argue the same points which Texaco has already argued in its petition, and have failed to raise any facts or questions of law which have not been adequately presented by Texaco. Indeed, the Applicants' motions and proposed briefs affirmatively demonstrate that the Applicants are not even acquainted with the factual record underlying this case. As a result, the Applicants' views can add little of value to the Court's consideration of Texaco's petition.

All of the Applicants incorrectly assume that this case involves true wholesalers who performed wholesale functions and received a "distributor" discount which had no competitive effect on Plaintiffs or any other retailers. While this characterization of the facts may aid an argument that the court of appeals opinion somehow jeopardizes legitimate wholesale

discounts, it bears little relation to the real facts. The evidence at trial showed clearly that Texaco extended Dompier and Gull a "distributor" discount even though, in the overwhelming number of cases, Dompier and Gull did not in fact function as wholesalers at all but as retailers who sold gasoline at retail in direct competition with Plaintiffs without performing "wholesale" functions, and that even in the limited instances when Dompier resold to other retailers it performed no real distribution functions but instead, with Texaco's knowledge and encouragement, passed the "distributor" discount on to retail stations who competed with Plaintiffs. The only realistic difference between Plaintiffs on the one hand, and Dompier and Gull on the other, was that Dompier and Gull were large purchasers who operated and controlled a large number of retail station outlets.

The evidence also clearly showed that the Dompier and Gull stations enjoyed an enormous competitive advantage over Plaintiffs as a result of their price discount, and that, as a result, Plaintiffs lost sales and profits (and, eventually, their stations) while the Dompier and Gull stations flourished. Texaco's own executives admitted that Dompier and Gull were not performing the functions for which the "distributor" discount was intended, and that the loss of sales by dealers such as Plaintiffs to "distributor" retailers such as Dompier and Gull "can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance." (Ex. 1.) In short, the facts showed exactly the kind of supplier favoritism of large buyers and competitive effects which the Robinson-Patman Act is designed to remedy.

These facts cannot be ignored, since they provide the essential basis for the jury's and the lower court's application of the Robinson-Patman Act to Texaco's pricing in Spokane, Washington. This Court, as all others, must apply the Act to this set of facts, not to a hypothetical set of facts constructed out of ignorance or a desire to support a particular point of view. " . . . [T]his fact-intensive approach is dictated by the statute itself, which . . . calls for an inquiry into whether the effect of a price discrimination has been or 'may be substantially to lessen . . . injure, destroy or prevent competition.'" Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1130 (D.C. Cir. 1988).

The Applicants seem to be concerned with a case which may exist elsewhere, but which does not exist here. This case did not involve legitimate functional

discounts, and nothing in the court of appeals opinion invalidates legitimate functional discounts. To the contrary, the court of appeals expressly recognized that "[m]anufacturers are permitted to use price differentials, commonly known as wholesaler functional discounts, to compensate certain classes of buyers for the distributional services they perform," and that "[f]or this reason, goods may generally be sold to wholesalers at a lower price than that charged to retailers." Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1038-39 (9th Cir. 1987). The true source of Applicants' (and Texaco's) concern is that the court of appeals, like two juries, two district courts and one appellate court before it, found what is obvious from the factual record — that there was sufficient evidence to conclude that in this case the price discrimination in fact affected com-

petition between Plaintiffs and the Dompier and Gull stations.

Thus, Applicants' suggestions that the court of appeals opinion threatens legitimate wholesale discounts, or requires manufacturers to unlawfully discriminate in price between different wholesalers or to control resale prices are simply inapplicable to the case before this Court. For almost 40 years the courts and the Federal Trade Commission have held that the Robinson-Patman Act applies in factual situations such as those presented here, yet wholesale discounts have not disappeared. The court of appeals simply applied well-established precedents, and honored this Court's long-standing insistence that substance rather than suppliers' labels govern Robinson-Patman compliance.

The Applicants represent similar interests and advance similar arguments as

Texaco, and raise no new facts or questions of law which are necessary for consideration of Texaco's petition. The Applicants' own motions demonstrate that they are not informed of the essential facts of this case, and that their concerns do not apply at all to the case before the Court. It is therefore respectfully submitted that the Applicants are not in a position to make any meaningful contribution as _amici curiae_, and that their motions should be denied.

DATED: July 27, 1988

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No. 87-2048

In the Supreme Court of the United States

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v.

RICKY HASBROUCK, d/b/a/ RICK'S TEXACO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether a supplier is liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), if it gives a functional discount to an independent wholesaler in excess of the wholesaler's costs, and the wholesaler passes on a portion of that discount to retailers, thereby undercutting the price that the supplier offers directly to retailers.

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The Department of Justice and the Federal Trade Commission enforce the federal antitrust laws. The Federal Trade Commission has developed much of the jurisprudence under the Robinson-Patman Act through administrative enforcement proceedings. This case presents the question whether a supplier is liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), if it gives a functional discount to a wholesaler in excess of the wholesaler's costs, and the wholesaler "passes on" a part of that discount to certain retailers, thereby injuring other retailers who purchase directly from the supplier. Because this question implicates the procompetition policies underlying the antitrust laws and the proper interpretation of the Robinson-

Patman Act, the government has a strong interest in its correct resolution. At the certiorari stage, the government filed a brief in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Texaco Inc. sold gasoline and other petroleum products in the Spokane, Washington area until 1981. Respondents are 12 individuals (or their successors in interest) who, from 1972 to 1981, operated retail gasoline stations in Spokane that sold gasoline under the Texaco brand name. J.A. 19-20.

Texaco sold gasoline directly to the respondents at a delivered "retail tank wagon" (RTW) price. It sold the same gasoline to at least two other firms in Spokane – the Dompier Oil Company and the Gull Oil Company – at a lower price, under distributor contracts providing for a discount from the RTW price. At some points during the relevant period, both Dompier and Gull sold some gasoline to retail stations neither owned nor controlled by them at prices that were lower than the RTW price charged by Texaco to retailers. The prices paid by respondents and by the customers of Dompier and Gull for gasoline were reflected in the pump prices charged to motorists. Pet. App. A4-A5; J.A. 27, 136-137, 149.

2. a. In January 1976, respondents filed suit against Texaco in the United States District Court for the Eastern District of Washington. The complaint, as amended, alleged that Dompier and Gull competed with respondents "in the resale of gasoline motor fuels" and that petitioner's sale of gasoline to Dompier and Gull at lower prices than those charged the respondents for gasoline of "like kind and quality" tended to "substantially lessen competition" between the respondents and Dompier, Gull, and the stations Dompier and Gull supplied, in violation of Section 2(a) of the Robinson-Patman Anti-Discrimination Act (Robinson-Patman Act), 15 U.S.C. 13(a). C.A. E.R. 13-14.

After a four week trial in late 1979, the jury rendered a verdict in favor of each respondent on the Robinson-Patman Act claim

and awarded damages totalling $849,484. Petitioner moved for judgment notwithstanding the verdict challenging, *inter alia*, the court's instructions on damages. The district court granted the motion because it concluded that the damages theory under which the case had been submitted to the jury was no longer valid, and respondents appealed. While the appeal was pending, this Court addressed the same damages issue in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), and rejected the view that plaintiffs in a Robinson-Patman Act case are entitled to "automatic damages" equal to the amount of an illegal price discrimination. Thereafter, the court of appeals held that respondents were entitled to attempt to prove damages under a theory consistent with *J. Truett Payne,* and it remanded the case for a new trial on both liability and damages. *Hasbrouck* v. *Texaco, Inc.*, 663 F.2d 930 (9th Cir. 1981), cert. denied, 459 U.S. 828 (1982).

b. The case was tried again in June 1985. Petitioner stipulated that it charged respondents a higher price for gasoline than it charged Dompier or Gull. See J.A. 29-31. At trial, the evidence showed that the stations owned or supplied by Dompier often posted *retail* prices that were barely, if at all, higher than the *wholesale* (RTW) price that petitioner charged respondents for their gasoline.[1] In addition, a number of respondents testified about complaints they received from customers concerning the difference between their retail prices and the prices charged by the stations owned or supplied by Dompier.[2]

Respondents also introduced evidence that they had complained repeatedly to petitioner, and that petitioner was aware

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[1] See, *e.g.*, Tr. 243, 351, 400, 493, 600, 640. Respondents introduced evidence pertaining to both Dompier and Gull, but the case focused primarily on the effect of the challenged discount on their ability to compete with stations that Dompier owned or supplied.

[2] See, *e.g.*, Tr. 238, 243, 249, 401, 600-601. Several former customers of particular respondents testified that they started purchasing some or all of their gas from the Dompier stations instead of respondents because of these retail price differences. See, *e.g.*, Tr. 480, 639-640, 1537-1539, 1586-1589, 1596-1597.

that its discount to Dompier and Gull conferred a competitive advantage on stations owned or supplied by distributors receiving the discount. Respondents argued that the wholesale services allegedly performed by Dompier were nonexistent or de minimis and, in any event, were fully covered by a "hauling allowance" petitioner granted Dompier in addition to its discount. Finally, there was evidence that Dompier's purchases of gasoline from petitioner increased substantially while respondent's purchases decreased. Respondents presented several different damage estimates based on differing assumptions as to how petitioner might have eliminated the challenged price difference.

Petitioner argued that the lower prices to Dompier and Gull were "functional discounts" reflecting various wholesale services Dompier and Gull performed. Petitioner also urged that respondents had failed to demonstrate that the challenged price differences caused any harm to competition because: (1) petitioner did not control the price at which Dompier or Gull resold gasoline at either the wholesale level or the retail level; (2) the respondents were not in substantial competition with Dompier, Gull, or any of the stations they owned, operated or supplied; and (3) factors other than the discounts to Dompier and Gull were responsible for the respondents' lost sales.[3]

The jury found for each respondent and awarded damages totalling $1,349,700 after trebling.

c. The district court denied petitioner's motions for a new trial and for judgment notwithstanding the verdict. Pet. App. B1-B17. The court acknowledged that "functional discounts"—those given to a buyer higher up in a supplier's distribution chain—generally do not trigger Robinson-Patman Act liability. The court, however, believed that this is not always

[3] Petitioner also sought to establish that its discounts were lawful under the "cost justification" and "meeting competition" provisos of Section 2(a) and (b), 15 U.S.C. 13(a) and (b). The district court, however, excluded the evidence on which petitioner primarily based its cost justification defense (Tr. 2871) and refused to submit the issue to the jury. The jury was instructed on petitioner's meeting competition defense.

so because "the critical question in determining the legality of a functional discount is whether the price differential has an adverse effect on competition * * *." *Id.* at B3. The court found that in this case, even though the "favored buyer[s]" (Dompier and Gull) were not in competition with the "disfavored buyers" (respondents), the evidence demonstrated that petitioner's discounts to Dompier and Gull adversely affected competition at the retail level. The court based its conclusion on the fact that the discounts given to Dompier and Gull exceeded the cost of the functions they performed, and those discounts were, in part, passed along to retail competitors of respondents. *Id.* at B4-B6.

3. The court of appeals affirmed. Pet. App. A1-A20. The court rejected petitioner's arguments that the Robinson-Patman Act requires only that all customers in a given functional class be treated equally and that any harm respondents suffered because Dompier "passed through" its discount to the stations it supplied in its wholesale capacity could not support a finding of Robinson-Patman Act liability. *Id.* at A7-A10. The court agreed that the Robinson-Patman Act allows "[m]anufacturers * * * to use price differentials, commonly known as wholesale or functional discounts," and that "goods generally may be sold to wholesalers at a lower price than that charged to retailers." *Id.* at A7. It also acknowledged that, "at least in their capacities as wholesalers, [Dompier and Gull] did not compete directly" with the respondents. *Id.* at A8. Nonetheless, the court concluded that "there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers." *Ibid.*

In the court's view, a discount to the favored buyers higher in the distribution chain would violate the Act if: "(1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with [the disfavored buyer]." Pet. App. A8. The court found that the evidence supported a finding in respondents' favor on both issues. As to whether the discount to Dompier and Gull was "cost-based," the court noted that the respondents had introduced evidence that the wholesale "services performed by

Gull and Dompier were insubstantial." The court also agreed with the district court that petitioner "made 'no serious attempt to provide a quantitative justification" for the discounts. As to whether the discount was passed on to stations buying from Dompier and Gull, the court pointed to evidence that "some retail stations operated or supplied by Dompier and Gull purchased gasoline at prices lower than those paid by" respondents. The court also referred to evidence that "service stations operated or supplied by Dompier often sold gasoline at retail prices that were only two or three cents higher than the price" respondents paid petitioner. Pet. App. A8-A9.

Thus, the court concluded that "[w]here, as here, the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function," a supplier can be held liable under the Robinson-Patman Act for adverse competitive effects at the lower market level of the disfavored customer. Pet. App. A9-A10.[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals concluded that a supplier violates Section 2(a) of the Robinson-Patman Act if it grants a wholesale discount to a firm and a jury finds (1) that the discount was not "cost based" and (2) that all or part of the discount was passed on to retailers, to the injury of other retailers who purchase directly from the supplier. In our view, that statement of the law is incorrect. Functional discounts extended to firms higher in a supplier's distribution chain are intended generally to recognize and compensate for the different marketing and distribution roles played by wholesalers and retailers. Imposing liability for downstream competitive effects of legitimate functional discounts does not advance the Act's purpose of ensuring equality

[4] The court of appeals also rejected petitioner's contention that respondents had failed to demonstrate the requisite injury to competition, noting among other things that there was "direct evidence of displaced sales." Pet. App. A10-A12. Finally, the court rejected petitioner's argument, based on *J. Truett Payne*, that the damages verdict was infirm because it supposedly could have rested on the amount of "overcharges" to respondents. Pet. App. A16-A17.

of competitive opportunity to firms at the same functional level. It also threatens to undermine other policies expressed in the antitrust laws, and creates burdensome compliance requirements for suppliers engaging in dual distribution through both wholesale and retail channels. Consequently, we urge the Court to reject a construction of the Robinson-Patman Act that imposes a new cost-justification requirement on a traditional activity that the Act was not intended to govern.

A. Price differentials between wholesalers and retailers are a sensible, routine, and pervasive means of doing business, and have long been woven into the distribution system of our economy. There is no persuasive evidence that Congress intended to alter those traditional patterns of trade in the Robinson-Patman Act. There is even less reason to believe that Congress contemplated that the Robinson-Patman Act would require suppliers to monitor their wholesalers' prices in a fashion that seriously undermines the policies of the antitrust laws.

The complex and imprecise language of the Robinson-Patman Act does not compel the holding of the court appeals. As it has done in other settings, the Court should interpret the Robinson-Patman Act in a fashion that accommodates the policies expressed in both Robinson-Patman and the Sherman Act. Such a reconciliation can be effected by holding that legitimate functional discounts to independent purchasers do not have an anticompetitive "effect" at lower levels of distribution. Because any competitive consequences at those levels are solely the result of the favored wholesaler's independent decision to "pass on" the supplier's discount, those consequences should not be deemed an effect of the original functional discount under Section 2(a).

B. The court of appeals' rationale would engender serious practical difficulties for firms seeking to comply with it, and would undermine well-established antitrust policies. Under the court of appeals' ruling, a supplier could incur Robinson-Patman Act liability even though it complied with the Act's fundamental mandate to treat similarly situated purchasers equally. To avoid liability, a supplier would be required either

(1) to attempt to preclude the independent wholesaler from passing through a portion of a wholesale discount, or (2) to eliminate the system of dual distribution. Even if the formidable practical obstacles to the former alternative could be surmounted, the likely result would be to penalize the most efficient and aggressively competitive wholesalers. And the latter alternative would directly threaten the very independent merchants that Congress sought to protect in the Robinson-Patman Act, as well as the consumers whose welfare is the focus of the antitrust laws generally.

C. Neither the legislative history nor the decisions of this Court support the application of the Robinson-Patman Act to legitimate functional discounts. The legislative history reveals that Congress considered protecting functional discounts by writing an exception into the Act that would govern different prices given to different classes of buyers. While this provision was not ultimately enacted, all available sources indicate that the buyer classification language was deleted in response to entirely separate concerns, not because Congress wanted to proscribe functional discounts. Given that a principal purpose of the Act was to protect independent wholesalers, and given the absence in the legislative history of any criticism directed at functional discounts as such, we do not read that history to mean that Congress intended to alter a traditional method of compensating independent distributors.

Nor do the precedents of this Court support the court of appeals' holding. The court of appeals relied on *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983); and *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), interpreting those decisions to hold that any adverse competitive effect on "customers of the favored buyer" who "compete with the disfavored buyer or its customers" can trigger Robinson-Patman Act liability. Those decisions, however, stand for far narrower propositions. *Morton Salt* holds only that a supplier cannot give a retail customer a steeper discount than a wholesale customer. And *Falls City* merely holds that a discriminatory discount given to one

wholesaler relative to another wholesaler can trigger liability if the customers of each wholesaler compete. Neither of those situations is present here.

The Court's opinion in *Perkins* could be read to apply here, but in light of the distinctive facts involved in that case, it should not be interpreted so broadly. In *Perkins*, the favored buyer, unlike the favored buyer here, passed on a discount through a series of subsidiary firms. Consequently, the competitors in *Perkins* can be seen as two vertically integrated firms in direct competition at the retail level. In this light, the case stands for the unremarkable proposition that a supplier that discriminates between firms at the same functional level can be held liable for anticompetitive effects. *Perkins* should not be extended to a case in which the original price discrimination reflects a legitimate functional discount given to a firm whose independent pricing policies then produce competitive consequences further down the chain of distribution—consequences for which the supplier is not responsible.

D. Applying the principles described above, we believe that the judgment should be reversed. For at least a portion of the time covered by the damages award, Dompier may have functioned as a wholesaler in reselling gasoline to respondents' competitors. Any damages to respondents flowing from those sales should not be recoverable under the Robinson-Patman Act. Accordingly, the case should be remanded to the court of appeals to determine the appropriate remedy on the basis of this record.

ARGUMENT

THE ROBINSON-PATMAN ACT DOES NOT IMPOSE LIABILITY ON A SUPPLIER FOR PRICING DISPARITIES RESULTING FROM THE DECISION OF AN INDEPENDENT FIRM TO PASS THROUGH A PORTION OF A LEGITIMATE FUNCTIONAL DISCOUNT

Section 2(a) of the Robinson-Patman Act prohibits a supplier from "discriminat[ing] in price between different purchasers" of goods where the effect may be to "injure, destroy, or prevent competition with any person who either grants or knowingly

receives the benefit of such discrimination, or with customers of either of them * * *." 15 U.S.C. 13(a). This case presents the question of how this general language should be applied to functional discounts. Specifically, the issue is whether the Robinson-Patman Act imposes liability on a supplier for charging a lower price to a wholesaler than a retailer if that functional discount is subsequently determined to exceed the wholesaler's costs and the wholesaler has "passed on" all or part of that discount to other retailers.

A functional discount is one given to a purchaser based on its role in the supplier's distribution system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier.[5] As the Federal Trade Commission has observed:

> Functional discounts long have been a traditional pricing technique by which sellers compensated buyers for expenses incurred by the latter in assuming certain distributive functions. The typical functional discount system provided for graduated discounts to customers classified in accordance with their place in the distribution chain, namely, wholesaler, retailer and consumer in diminishing amounts. They were intended to reflect, at least from an economic viewpoint, the seller's estimates of the value of the marketing functions performed by the various classes of customers.

[5] See Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. & Com. L. Rev. 543, 545 n.9 (1976); Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L.J. 929, 935-936 (1985); Shniderman, *"The Tyranny of Labels"–A Study of Functional Discounts Under the Robinson-Patman Act*, 60 Harv. L. Rev. 571, 572-575 (1947). Throughout this brief, we will for simplicity's sake use the terms "wholesaler" and "retailer" to refer to the differing levels in the chain of distribution that each is ordinarily understood to occupy: the retailer sells to end-users, and the wholesaler sells to retailers. Discounts based on the position occupied by a firm in the chain of distribution have sometimes been referred to as "trade discounts," and have been contrasted with discounts designed to reflect the specific function performed by a customer, regardless of its formal position in the chain of distribution, which have been labeled "functional discounts." See Pet. App. B2-B3 n.2. Because we believe that the key distinction for Robinson-Patman purposes is whether firms in the distribution chain compete for resale customers, we do not believe it useful to explore those fine distinctions here. Nor do we believe it necessary to develop in this case a comprehensive analysis to deal with the increasingly common but more complex problems that arise from functional discounts given to vertically integrated firms. Compare *Doubleday & Co.*, 52 F.T.C. 169 (1955), with *Mueller Co.*, 60 F.T.C. 120 (1962).

Doubleday & Co., 52 F.T.C. 169, 207 (1955). As a rule, such discounts are not tied to any exact measure of the marketing costs performed by the customer. See McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 Law & Contemp. Probs. 334, 347 (1937). And, of course, functional discounts do "not merely cover the buyer's costs," but also include "some allowance for profit." *Ibid.*

If read without consideration of Congress's purposes and objectives, the enigmatic phrasing of the Robinson-Patman Act could be interpreted to prohibit petitioner's conduct in this case. Petitioner is a "person engaged in commerce"; it "discriminate[d] in price between different purchasers"; the "effect of [the] discrimination" was, arguably, to "injure * * * competition"; and the competitive injury was visited upon the supplier, the favored purchaser, or–in a phrase that applies to respondents–*"customers of either of them."* 15 U.S.C. 13(a) (emphasis added). As Justice Frankfurter long ago observed, however, "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 65 (1953).[6] Consequently, this Court has not reflexively applied the language of the Act to new situations, but instead has carefully analyzed a particular challenged pricing arrangement in order to determine how to apply the policies and purposes of the Act. *Ibid.* The Court has also insisted that the Robinson-Patman Act be read with due regard for the procompetition policies expressed in the antitrust

[6] See also *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) ("Robinson-Patman amendments by no means represent an exemplar of legislative clarity."); *id.* at 359-360, 362 (Harlan, J. dissenting) (describing the Robinson-Patman Act as "confusing," "inconsistent," and a "notoriously amorphous statute").

laws. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 456-458 (1978); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80-81 (1979); *Automatic Canteen Co.*, 346 U.S. at 63, 74. In our view, therefore, the language of the Robinson-Patman Act should not be construed to impose liability on a supplier where the supplier gives a legitimate functional discount to a purchaser, and the purchaser makes an independent decision to pass along all or part of that discount to its customers. In those circumstances, the discount should not be regarded as a form of discrimination that has "the effect of * * * injur[ing], destroy[ing], or prevent[ing] competition with * * * the customers of either" the supplier or the favored purchaser.

A. The Regulation Of Functional Discounts Does Not Further Congress's Intent To Ensure Equality Of Competitive Opportunity To Purchasers At The Same Functional Level

The Robinson-Patman Act was intended to remedy what Congress perceived as unfair and economically unjustified pricing concessions granted to large retail chains at the expense of competing independent merchants. See *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349-350 (1968); *FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 169 (1960); *Hearings on H.R. 8442, H.R. 4995, and H.R. 5062 Before the House Committee on the Judiciary*, 74th Cong., 1st Sess. 5-6 (1935); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 3-11 (1962); 1 ABA Antitrust Section, Monograph No. 4, *The Robinson-Patman Act: Policies and Law* 8-21 (1980). The overriding theme of the congressional debate on the Act was the need to combat the "increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 75-76. Congress sought to "assure, to the extent reasonably practicable, that businessmen at the *same functional level* would start on equal competitive footing so far as price is concerned." *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 520 (1963) (emphasis added). See also *Abbott Laboratories* v. *Portland Retail Druggists Ass'n*, 425

U.S. 1, 12 (1976) ("the focus of Robinson-Patman is on competition 'at the same functional level' ").[7]

The objectives of the Robinson-Patman Act would not be served by extending its reach to discounts to firms at *different* functional levels in a distribution system.[8] Functional discounts have long been thought to fall outside of the coverage of the Robinson-Patman Act precisely because they do not raise the concern for a "level playing field" for competitors that the Act sought to protect. Thus, as the Federal Trade Commission observed in *Doubleday & Co.*, 52 F.T.C. at 207-208, "[a] discount granted to * * * wholesalers [does] not injure retailers who received no equivalent price reduction, since they [do] not compete for the consumer's business." Consequently, "functional discounts to single-function distributors were considered above legal reproach." *Id.* at 208. See also *Boise Cascade Corp.*,

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[7] The Act did not outlaw all price differences. Thus, sellers remain free under the Act to demonstrate that a lower price to a particular purchaser reflects "only due allowance for differences in the cost of manufacture, sale, or delivery" (15 U.S.C. 13(a)), to charge lower prices in response to "an equally low price of a competitor" (15 U.S.C. 13(b)), and to adjust prices as necessary to accommodate a variety of market conditions that might arise in the ordinary course of business. 15 U.S.C. 13(a).

[8] Of course, the discounts must be provided to firms that are "higher" in the distribution chain. Giving a greater discount to a retailer than a wholesaler can indeed violate the Act and was one of the principal problems at which Congress aimed.

> A typical price discrimination detrimental to competition arises from *lower* prices granted to large retailers than to wholesalers or jobbers. For in such a case, the retailer paying the preferential price can resell to consumers at lower prices than those retailers who pay more to the wholesalers which are charged a higher price by the supplier. Hence the forbidden statutory "injury" to competition *with* the recipient of the discriminatory lower price – the retailer paying less – may readily come to pass on the retailer level.

F. Rowe, *supra*, at 175 & n. 9 (citing *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948) as the "classic case" of this genre). But "there will normally be no Robinson-Patman problems if a seller charges a *higher* price to its customers *further down* the distributional chain, *e.g.*, if the seller charges more to retailers than to wholesalers." 3 E. Kintner & J. Bauer, *Federal Antitrust Law* § 22.14, at 307 (1983).

107 F.T.C. 76, 199 (1986) ("If the wholesaler does not sell to end-user customers in competition with the retailer, the difference in the prices that the wholesaler and the retailer pay cannot support a claim of secondary line competitive injury under the Act."), rev'd on other grounds, 837 F.2d 1127 (D.C. Cir. 1988); *General Foods Corp.*, 52 F.T.C. 798, 824 (1956) ("a seller is not forbidden to sell at different prices to buyers in different functional classes" that do not compete). The lower courts have generally agreed with this view.[9]

It is thus no surprise that functional discounts have long been assumed to be fully consistent with the Robinson-Patman Act. The marketing strategy of using a "dual distribution" network, in which a firm sells directly at different prices to retailers and wholesalers, was a prevalent practice at the time the Act was passed.[10] Far from seeking to disrupt this traditional pattern of trade, with its multiple layers of independent firms, Congress

[9] Statements in a number of opinions reflect this assumption. See, *e.g.*, *O'Byrne* v. *Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984); *Dart Industries, Inc.* v. *Plunkett Co. of Oklahoma, Inc.*, 704 F.2d 496, 499 (10th Cir. 1983); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977); *American Oil Co.* v. *McMullin*, 508 F.2d 1345, 1353 (10th Cir. 1975). But see *Standard Oil Co.* v. *FTC*, 173 F.2d 210 (7th Cir. 1949), rev'd on other grounds, 340 U.S. 231 (1951), discussed *infra* at 20-22.

[10] See, *e.g.*, McNair, *supra*, 4 Law & Contemp. Probs. at 346 ("Among the earliest straddles of this type were those made by manufacturers who decided to sell part of their output directly to retailers while continuing to sell the rest of it through wholesalers. The trade discount was the characteristic pricing device used to meet the requirements of this situation."); 1 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 2.04[1], at 2-105 to 2-106 (1989) (noting that distribution through "middlemen, *i.e.*, wholesalers or jobbers, who, in turn, supplied the retailers with whom the ultimate consumer dealt" was a standard mode of distribution when Clayton Act was originally passed in 1914; the impetus for passage of Robinson-Patman Act amendments to Clayton Act was the threat to the "established manufacturer-wholesaler-retailer hierarchy [posed] by the emergence of new forms of marketing organizations," primarily chain stores, "which usurped the functions of the middleman or combined the functions of all three businesses into one operating unit"). See generally J. Palamountain, *The Politics of Distribution* 18-23 (1955) (describing traditional distribution systems).

enacted the Robinson-Patman Act in response to the vertical integration of "chain stores" that were using their buying leverage to extract more favorable prices than true wholesalers were getting, to the detriment of independent wholesalers and their retail customers.

Accordingly, the text of the Robinson-Patman Act should not be read to regulate legitimate functional discounts.[11] The Act governs pricing disparities only when "the effect of such discrimination may be * * * to injure, destroy, or prevent competition" with the supplier, the favored buyer, or customers of either of them. 15 U.S.C. 13(a). The natural "effect" of legitimate functional discounts is not to produce competitive harms at the different levels of distribution involved. Consequently, the competitive effects that flow from a wholesaler's independent decision to "pass on" the supplier's functional discount should not be deemed an effect of the original discount.[12]

[11] In order to be "legitimate," a functional discount must be given to a firm that performs some services for the supplier (such as physically delivering products on resale, managing inventory, or assuming credit risks) not performed by firms further down the chain of distribution. Clearly, therefore, suppliers that employ discriminatory pricing tactics at the retail level by means of a "dummy" wholesaler, controlled by the supplier, cannot evade liability under the Act. In that situation, the dummy firm's customers would be deemed the customers of the supplier for purposes of the Act. Cf. *Purolator Products, Inc.* v. *FTC*, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); *General Auto Supplies, Inc.* v. *FTC*, 346 F.2d 311 (7th Cir.), cert. dismissed, 382 U.S. 923 (1965). Cf. *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 353 (1968) (discussing doctrine of liability under 15 U.S.C. 13(d) when "a supplier in effect supplants his intermediate distributors in dealings with those to whom the distributors resell and favors some of the distributors' accounts over others"). Likewise, a functional discount must accurately reflect competitive realities. "[A]mbiguous labels, which might be used to cloak discriminatory discounts to favored customers" cannot defeat the coverage of the Act. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 475 (1952) (disregarding supplier's classification of certain buyers as "wholesalers" when they in fact competed with other purchasers at the "applicator" level).

[12] While it would be possible under the literal language of the Act to trace the competitive effects of functional discounts to the next competitive level under the "customers" clause of Section 2(a), Congress obviously intended that this Court give the broad commands of the antitrust laws, of which the

B. The Requirement That Functional Discounts Be "Cost Based" If An Independent Supplier Passes Them On To Firms Lower In The Chain Of Distribution Would Present Difficult Compliance Problems And Would Directly Conflict With Policies Embodied In The Antitrust Laws

1. The court of appeals recognized the existence and legitimacy of "functional discounts." Nevertheless, the court insisted on severely restricting the circumstances in which a dual distributing supplier may safely extend them. Read most broadly, the court's opinion would require a supplier to show that a functional discount is justified by the wholesaler's costs in order to protect itself from liability arising from the wholesaler's "passing on" of the discount to retailers that compete with retailers who purchase directly from the supplier.[13]

Such a requirement would deprive suppliers who engage in dual distribution of any adequate means of avoiding Robinson-Patman Act liability. A supplier could not find refuge in conduct that would normally provide a safe harbor under the Robinson-Patman Act: treating all purchasers at the same functional level equally. Rather, it would be forced to undertake a potentially expensive compliance program, with uncertain results. The court of appeals' approach would thus undermine the ability of firms to establish pricing programs that satisfy the

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Robinson-Patman Act is a part, concrete and particularized content in light of their history, policies, and purposes. For example, the Sherman Act's sweeping prohibition of any "restraint of trade," if read literally, "would outlaw the entire body of private contract law," *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515, 1526 (1988) (Stevens, J., dissenting), but this Court has recognized that Congress obviously had no such intention. Accordingly, the Court has construed Section 1 to encompass only "unreasonable" restraints of trade. See, *e.g.*, *NCAA* v. *Board of Regents*, 468 U.S. 85, 98 & n.17 (1984). Similar principles should be applied here.

[13] The contours of the court's holding are uncertain, as the court stated that suppliers may be held responsible for retail level disparities if a functional discount is "sufficiently substantial" and is "unrelated to the costs of the customer's function," without affording more precise definitions of those terms. Pet. App. A9.

Act. This Court should hesitate before embracing a rule whose ramifications make it extraordinarily burdensome for firms to achieve compliance, yet simultaneously exposes them to treble damages.[14] An additional factor that also counsels restraint is the absence of any reason to believe that the facts of this case are representative of a widespread "problem" calling for a solution that imposes across-the-board regulatory restraints on all dual distributors.[15]

2. More fundamentally, the court's rule transgresses this Court's admonition that the Robinson-Patman Act must be construed, whenever possible, in a manner that is consistent with the procompetition policies expressed in the antitrust laws. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 456-458 (1978); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80-81 (1979).[16] There is without question a degree of

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[14] Imposing such a framework on dual distributors seems particularly unwarranted because, absent special circumstances (for example, where one group of retailers has a lower elasticity of demand for the supplier's product *and* is contractually bound or otherwise constrained to purchase only from the supplier rather than from an independent wholesaler), a supplier would have no economic incentive to charge its own retailers a higher price than the effective price charged by independent wholesalers.

[15] This case appears to reflect rather anomalous behavior on the part of the supplier. One possible explanation for what happened here is afforded by Federal Energy Administration (FEA) regulations that governed the pricing of petroleum products in the 1970s, and which apparently constrained to some degree petitioner's flexibility in adjusting its prices. See generally *Typhoon Car Wash, Inc.* v. *Mobil Oil Corp.*, 770 F.2d 1085, 1087-1088 (Temp. Emer. Ct. App.), cert. denied, 474 U.S. 981 (1985); Tr. 2083-2086 (explanation by petitioner's witness that altering price to distributors in the Spokane market would have "cost" petitioner several million dollars under FEA "cost bank" accounting procedures). Petitioner apparently attempted to reduce its wholesale discount in 1973 and 1977, but that effort was challenged on the basis that it violated then-applicable FEA regulations. Tr. 2038, 2084-2085. The district court rejected petitioner's asserted defense based on the FEA regulations the first time the case was tried. That ruling was affirmed on appeal (663 F.2d at 933) and is not at issue here.

[16] In *United States Gypsum Co.*, the Court held that the "meeting competition" defense under the Robinson-Patman Act could not justify interseller verification of prices because of the vast potential of that practice to engender

tension between the policy of the Sherman Act to protect the competitive process, not competitors, and the objective of the Robinson-Patman Act to regulate seller pricing practices in order to protect some individual competitors. But the Court has sought to reduce the friction between the two statutes by declining to expand the coverage of the Robinson-Patman Act in ways that would "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co.*, 346 U.S. at 63.

The court of appeals gave insufficient attention to Sherman Act concerns. To begin with, a supplier cannot directly prevent an independent wholesaler from undercutting the supplier's price to retailers. An agreement between the supplier and wholesaler concerning the wholesaler's resale price would be a per se violation of the Sherman Act. *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515 (1988); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Nor are the other possibilities any more satisfactory. In theory, the supplier could offer to match the lowest price offered by any independent wholesaler with which it deals, thereby equalizing the competitive environment. But in practice it is doubtful that a supplier could determine the lowest price being offered by independent firms, and make the corresponding adjustments to its own prices, on a continuing basis—particularly in an industry such as the one involved in this case where prices may change daily on a market-by-market basis. Moreover, the supplier might not be able to match the lowest price available from a wholesaler without pricing below its own costs (and possibly opening itself to a charge of predatory pricing). Indeed, the more efficient the wholesaler, the less likely it

price fixing (438 U.S. at 458-459). In *Great Atlantic & Pacific Tea Co.*, the Court held the same defense did not compel buyers to disclose to sellers the quotes of their competitors because of concerns that such a requirement would "frustrate competitive bidding" (440 U.S. at 80).

is that the supplier *could* match the lowest prices available from the wholesaler.[17]

A supplier would also encounter difficulties in seeking to tailor the wholesale discount precisely to the costs and pricing strategies of the individual wholesalers, with the goal of eliminating any possibility that the discount could be passed through. The supplier is unlikely to have the necessary information about the costs and marketing strategies of the firms with which it competes for sales to retailers. Cf. *Automatic Canteen Co.* v. *FTC*, 346 U.S. at 68-69 (noting the impracticality of charging buyer with responsibility of discovering seller's costs that are not only not in its hands, but "are ordinarily obtainable even by the seller only after detailed investigation of the business"). Nor is the wholesaler likely to be eager to provide information that may result in its wholesale discount being reduced.

Moreover, the burden of requiring such customer-by-customer tailoring of the discount could be overwhelming. The Court has consistently refused to construe the Robinson-Patman Act to impose such burdens. Cf. *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 449 (1983) (a requirement that the "meeting competition" defense be applied on a customer-by-customer basis might make meaningful price competition unrealistically expensive); *United States* v. *Borden Co.*, 370 U.S. 460 (1962) (the cost justification defense can be based on customer groups rather than individual customers). And if the seller failed to calibrate the discount precisely, its discrimination among wholesalers could cause precisely the type of injury to wholesalers that the Robinson-Patman Act is designed to forestall.

[17] A supplier could try the alternative strategy of reducing the wholesale discount in order to eliminate the threat that a wholesaler would undercut the supplier's retail prices. But this would only penalize all but the most efficient wholesalers and, by driving some wholesalers out of business, would reduce price competition between wholesalers and the supplier, undermining the pro-consumer congressional policy embodied in the antitrust laws. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979).

Faced with no adequate means of limiting their exposure to Robinson-Patman Act liability under the court of appeals' theory, many suppliers might forego dual distribution altogether. Some might abandon wholesalers (or eliminate the wholesale discount, which is tantamount to the same thing) and deal only with retailers. Others might refuse to sell directly to retailers, channeling all of their goods through wholesalers. Still other suppliers might be encouraged to integrate vertically downstream, perhaps by absorbing smaller marketing organizations. In any of these situations, the losers would include the nonintegrated "independent merchant," *FTC* v. *Fred Meyer, Inc.*, 390 U.S. at 349-350—resulting in the very type of harm that Congress intended to avoid under the Robinson-Patman Act.

Also among the losers would be consumers. Depriving consumers of the benefits of efficient distribution systems is not only irreconcilable with the procompetition policies of the Sherman and Clayton Acts, but also runs flatly contrary to the purposes of Congress in enacting the Robinson-Patman Act. See, *e.g., Automatic Canteen*, 346 U.S. at 72 n.11 ("Time and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes."); Silcox & MacIntyre, *The Robinson-Patman Act and Competitive Fairness: Balancing the Economic and Social Dimensions of Antitrust*, 31 Antitrust Bull. 611, 663 (1986).

3. For precisely the reasons outlined above, the only other reported appellate decision to hold a supplier liable under the Robinson-Patman Act for comparable independent pricing decisions by a wholesaler has been roundly criticized. See *Standard Oil Co.* v. *FTC*, 173 F.2d 210 (7th Cir. 1949), rev'd on other grounds, 340 U.S. 231 (1951). As a remedy in that case, where the wholesaler had resold to retail stations below Standard's price, the Commission ordered Standard not to charge its wholesalers a price lower than Standard's price to its retail customers when the wholesalers were reselling below Standard's retail price. 173 F.2d at 217. The court of appeals, recognizing the manifest impossibility of compliance with this provision as written, modified it to direct Standard not to sell gasoline to

wholesalers at prices less that its retail price, in circumstances where Standard knew or had reason to know that the wholesalers would undercut Standard's retail price in reselling to retailers who compete with the direct purchasing retailers. *Ibid.*

With rare unanimity, commentators have condemned the *Standard Oil* order.[18] The *Report of the Attorney General's National Committee to Study the Antitrust Laws* 206-207 (1955) (footnotes omitted) (quoted at 3 E. Kintner & J. Bauer, *supra* § 22.15, at 320 n.306), explained the concerns raised by the order in terms that apply with equal force here:

> A supplier according functional discounts to a wholesaler or other middleman while at the same time marketing directly to retailers encounters serious legal risks under the Commission's *Standard Oil* ruling. The supplier is charged with legal responsibility for the middlemen's pricing tactics, and hence must control *their* resale prices lest they undercut him to the unlawful detriment of his directly purchasing retailer customers. Alternatively, the seller may forego his operational freedom by matching *his* quotations to retailers with *theirs*. Of course the supplier may avoid these risks by abolishing the functional differential or abandoning sales to middlemen altogether.

The Committee concluded that "imposing on any dual supplier a legal responsibility for the resale policies and prices of his in-

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[18] See, *e.g.*, F. Rowe, *supra*, at 196-205 (criticizing *Standard Oil* and aguing that "any lower price in favor of a distributor always creates a capacity to 'pass it on' and underprice the supplier (or other distributors) in resales to the 'retailer' level") (emphasis omitted); C. Edwards, *The Price Discrimination Law* 304-313 (1959) (noting "unavoidably awkward" consequences of holding manufacturers liable for differences in prices paid by directly supplied retailers and those who purchase through distributors); 5 J. von Kalinowski, *Antitrust Laws and Trade Regulation* §§ 31.02-03, at 31-66 to 31-91 (1989); 3 E. Kintner & J. Bauer, *supra* § 22.15, at 320 (critizing *Standard Oil* and *Perkins*, and suggesting that they be understood as "arising in unusual circumstances, which should preclude them from being extended beyond their facts"). See also Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 Yale L.J. 929, 942-944 (1951).

dependent distributors contradicts basic antitrust policies." *Ibid.*

Indeed, the Federal Trade Commission itself later abandoned this theory. In subsequent proceedings in the *Standard Oil* case, the Solicitor General, in a brief filed on behalf of the Commission in this Court, expressly disavowed any purpose "to require Standard to eliminate legitimate functional pricing or to make it responsible for the pricing practices of its wholesaler[s]." As one factor supporting that decision, the Solicitor General noted the conflict between the order and " 'broader antitrust policies.' " See Gov't Reply Br. at 32 in *FTC* v. *Standard Oil Co.*, 355 U.S. 396 (1958).[19]

C. Neither The Legislative History Of The Robinson-Patman Act Nor The Decisions Of This Court Support The Significant Limitations Placed On Functional Discounts By The Court Of Appeals

In light of the practical problems that the court of appeals' rule would spawn, as well as its capacity to undermine sound antitrust policies, this Court should not endorse such a construction of the Act's inherently imprecise language unless compelled to do so by evidence of congressional intent or precedents of this Court. Neither the legislative history nor this Court's decisions require that result.

1. The Robinson and Patman bills as originally introduced exempted from their coverage differences in price based on the classification of the buyer.[20] Counsel to the United States Wholesale Grocers Association and principal draftsman of the

[19] We have reproduced the relevant portion of the government's brief in *Standard Oil* in an appendix, *infra*, 1a-2a.

[20] In each chamber, the bills provided that "nothing herein contained shall prevent differentials in prices between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers * * *." H.R. 8442, 74th Cong., 1st Sess. (1935); S. 3154, 74th Cong., 1st Sess. (1935).

Robinson-Patman bill, H.B. Teegarden, explained that these bills would "permit[] manufacturers and others to continue, so far as they desire, to give differentials between those classes of buyers as they have since time immemorial." *House Hearings on H.R. 8442, H.R. 4995, H.R. 5062,* 74th Cong., 1st Sess. 106 (1935).[21]

The bills that emerged from the Committees retained the protection for discounts based on the class of buyer. The Senate and House Committee Reports explained that "[s]uch differentials, so long as equal treatment is required within the class, do not give rise to the competitive evils at which the bill is aimed; while to suppress them would produce an unwarranted disturbance of existing habits of trade." S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8-9 (1936).

Although the proposed exemption for class-of-buyer discounts was ultimately deleted, the legislative materials suggest that this was not because Congress rejected the theory supporting it, as expressed in the Committee reports. Rather, the exemption was deleted because farm interests objected to certain language in the provision, for reasons unrelated to functional discounts as such. As reported out of committee, the House bill not only exempted class-of-buyer discounts from the non-discrimination rule, but also included complex provisions governing the classification of vertically integrated buyers. See H.R. Rep. No. 2287, *supra,* at 8-9. The bill provided that when a buyer functioned both on the wholesale and retail levels, it would be classified by the "character of the selling." *Id.* at 1-2.

[21] The bill introduced by Rep. Utterback as an alternative to the Patman bill contained a similar exemption for "differences in price or in terms of sale founded solely and in good faith upon classification of customers as wholesalers or jobbers, remanufacturers, or processors, retailers or consumers." H.R. 10486, 74th Cong., 2d Sess. (1936); *House Hearings on H.R. 4995, H.R. 8442, H.R. 10486,* 74th Cong., 2d Sess. 271 (1936). As Rep. Utterback explained, the purpose of the legislation was not to prohibit all price discrimination, but only discrimination in cases where "some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other." 80 Cong. Rec. 9416 (1936).

Farm interests were concerned that under that provision agricultural cooperatives might fail to qualify for wholesale discounts.[22] Consequently, although the buyer-classification provision passed in the Senate bill,[23] it was deleted from the House bill,[24] and the Senate acceded to the House version without explanation.[25]

This legislative record discloses no intention on the part of Congress to call into question the practice of offering functional discounts, or to compel suppliers to continue dual distribution programs only on pains of monitoring the costs and prices of their wholesale customers. "[F]unctional discounts were a common business practice when the Act was passed, and it might be presumed that Congress would not have acted merely by omission if it truly wanted to forbid such a common practice." *Boise Cascade Corp.*, 107 F.T.C. 76, 209 (1986), rev'd on other grounds, 837 F.2d 1127 (D.C. Cir. 1988). At best, the record suggests that Congress evinced special solicitude for functional discounts, intended to protect them, and dropped specific

[22] In debate on the provision, Rep. Patman addressed the "opposition by the farm organizations [to] the classification section," explaining that "[t]hey were opposed to the classification of wholesalers and retailers." 80 Cong. Rec. 8113 (1936). Letters from these groups reprinted in the Congressional Record make plain that the ground for their objection was that under "the classifications of purchasers * * * farmer-owned and farmer-controlled cooperative associations would be deprived of their wholesalers' and jobbers' discounts." One letter proposed that "this classification [be] eliminated entirely or an exemption granted to cooperative associations." *Id.* at 8116-8118.

[23] 80 Cong. Rec. 6427-6428, 8418-8419 (1936).

[24] 80 Cong. Rec. 8122-8123 (1936) (remarks of Rep. Boileau) (describing Judiciary Committee's agreement to deletion of buyer classification language, as suggested by the farm organizations, "primarily, because it would be detrimental to the best interests of the farmer cooperatives"); *id.* at 8139 (remarks of Rep. Miller) (offering amendment to delete buyer classification subsection); *id.* at 8223 (passing the amendment without further discussion).

[25] See H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936). Accounts of those events are provided in C. Edwards, *supra*, at 25 n.8, 42-44; Silcox & MacIntyre, *supra*, 31 Antitrust Bull. at 637; F. Rowe, *supra*, at 18; J. Palamountain, *supra*, at 226-227; Shniderman, *supra*, 60 Harv. L. Rev. at 585-586; Calvani, *supra*, 17 B.C. Indus. & Com. L. Rev. at 545-546 n.14; and McNair, *supra*, 4 Law & Contemp. Probs. at 349-350.

language for doing so only because objections were raised on entirely other grounds (by farm interests afraid of losing their functional discounts). Even if read less sympathetically, the history suggests at most that the question is an open one under the Act. Cf. 107 F.T.C. at 209 (finding the legislative history to be "inconclusive" on the practice of giving functional discounts).

2. The court of appeals relied on three decisions of this Court to support the proposition "there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers." Pet. App. A8, citing *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 43-44 (1948); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 434-435 (1983); *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 646-647 (1969). None of those decisions justifies the analytical approach to functional discounts that the court of appeals adopted.

In *FTC* v. *Morton Salt Co.*, a large, vertically integrated retail buyer was able to obtain quantity discounts from the supplier that were not available to the wholesaler, and, consequently, the wholesaler's customers were harmed in competition with the favored buyer. *Morton Salt* thus involved "the paradigm setting envisioned by Congress – a quantity discount to large buyers." *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127, 1139 (D.C. Cir. 1988). That decision is not at all applicable to a case such as this one in which the supplier charges a *higher price* to a retailer than a wholesaler. See F. Rowe, *supra*, at 198 n.103 ("[T]he Supreme Court's Morton Salt decision bars a *lower price to a retailer* than to wholesalers whose customers competed with the 'favored' retailers * * *.").

In *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, a supplier charged two *wholesalers* different prices, which were then passed on to competing retailers. Although the wholesalers were precluded from competing with each other as a matter of state law, 460 U.S. at 432, the Court found that the requirement of competitive injury was satisfied, explaining that "the competitive injury component of a Robinson-Patman Act violation

is not limited to the injury to competition between the favored and disfavored purchaser; it also encompasses the injury to competition between their customers." *Id.* at 436. *Falls City* governs cases in which the supplier has created the disparity between the purchase prices of businesses operating at the same functional level, and can therefore reasonably anticipate that the disparity it has created will persist downstream. The Court had no occasion to consider functional discounts given to firms at different competitive levels.

The only decision of this Court that lends some support to the court of appeals' formulation is *Perkins* v. *Standard Oil Co.* In that case, the disfavored buyer, Perkins, purchased gasoline from Standard Oil in wholesale and retail capacities. Standard's favored buyer was Signal Oil, which passed on the discounts to its 60% owned subsidiary Western, which in turn passed on the discounts to its 55% owned subsidiary Regal. Regal operated retail stations in competition with Perkins and was able to undercut Perkins' prices. Perkins sued the supplier, alleging that its retail operations were harmed by price discrimination in favor of Signal. 395 U.S. at 645-646. The Court held that Regal should be considered a "customer" of Signal (the favored purchaser), and that Perkins could recover for its competitive injury, because a contrary reading of the statute "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." *Id.* at 647.

Perkins need not and should not be read more broadly than its distinctive facts. The favored buyer in *Perkins* was part of a linked chain of corporate entities functioning at the wholesale and retail levels. 395 U.S. at 645, 648. Taking into account those corporate affiliations, the supplier's violation in *Perkins* consisted simply in discriminating in price between two rival businesses that competed as vertically integrated retailers.[26] The discrimination, therefore, was given to customers at the same

[26] This was the view of the case held by Justice Marshall, 395 U.S. at 651 (concurring in part and dissenting in part), who would have treated the parent and subsidiaries as essentially one business entity and would therefore have treated Signal as a competitor of Perkins, without "intimat[ing] even by indirection, what the result would be if wholly independent firms had intervened in the distribution chain." Although the Court did not respond to the point, it is not entirely clear today that the Court would treat the interlocking entities in *Perkins* as other than a single economic unit for antitrust purposes. Cf. *Copperweld Corp.* v. *Independence Tube Co.*, 467 U.S. 752 (1984).

functional level.[27] In this case, by contrast, independent pricing decisions by wholesalers are an intervening factor between the supplier and the ultimate retail customer. Because the considerations bearing on competitive consequences in this setting are quite different, and were not examined or applied in *Perkins*, that case should not be extended here.[28]

D. The Judgment In This Case Must Be Reversed Because A Portion Of The Damages Award Against Petitioner May Reflect Injury From Pricing Practices That Did Not Violate The Robinson-Patman Act

Under the principles described above, the judgment against petitioner cannot stand. It appears that for at least a portion of the time during which petitioner sold gasoline to Dompier at lower prices than it sold to respondents, Dompier functioned as a wholesaler reselling gasoline to retail stations that competed with respondents. Because any such sales by petitioner could reflect legitimate functional discounts, the court below would

[27] The court in *Perkins* may also have viewed Perkins as being a wholesaler itself, just as the favored purchaser was characterized as a wholesaler. See 395 U.S. at 644.

[28] To be sure, some statements in the majority opinion in *Perkins*, taken out of context, could be read to support the court of appeals' holding that competitive injury can be found if "the customers of the favored buyer compete with the disfavored buyer * * *." Pet. App. A8. See 395 U.S. at 647-648, 649. But the opinion in *Perkins* did not expressly consider claims (like those asserted here) of injury flowing from competition between the disfavored buyer and *unaffiliated* customers of the favored buyer. Indeed, the Court in *Perkins* did not even cite the *Standard Oil* decision – the only case that supports the court of appeals' approach here that a wholesale discount "passed on" through independent pricing policies can give rise to Robinson-Patman liability on the level of directly purchasing retailers.

have erred in holding petitioner liable for downstream injuries caused by the resale of that gasoline at prices that undercut petitioner's sales to respondents.

To be sure, as we noted in our brief at the certiorari stage, the jury may in fact have viewed Gull and Dompier largely as retailers in competition with respondents and thus may have imposed liability without regard to any "pass-through" of a wholesale discount. Gov't Amicus Br. 16-17. To the extent that the damages award rested on such a finding, it would not be improper under Section 2(a), as we construe it. However, even though Gull apparently never operated solely as a wholesaler, and Dompier concededly was in the retail business beginning in 1974 (in the early portion of the damages period) the record suggests that for a time Dompier may have sold gasoline at wholesale to stations that it did not own. See Gov't Amicus Br. 17 & n.23; cf. Br. in Opp. 4-5 & n.7; 18. The record also suggests that the proof of damages was not segregated by time period so as to permit ready elimination of any impermissibly imposed amounts. For those reasons, we believe that the judgment must be reversed and the case remanded for further proceedings in the lower courts.[29]

[29] Even if the Court rejects our position and agrees with the court of appeals that a supplier may in certain circumstances be held liable under the Robinson-Patman Act for independent pricing decisions by an unaffiliated wholesaler who received a functional discount, it is important to clarify the standards under which such a finding of such liability would be appropriate. At a minimum, we think a supplier would have to be shown to have had a degree of knowledge that a functional discount would be passed on before liability would attach in these circumstances. That test could perhaps encompass imputed knowledge when reasonable to do so, but should not be so stringent as to require suppliers to set up price monitoring systems that might encourage anticompetitive behavior. Cf. *United States* v. *United States Gypsum Co.*, *supra*.

In addition, the court of appeals failed to articulate precise or workable standards for implementing its principle that a functional discount that is passed on must be "cost based" in order to pass muster under the Act. Uncertainty and confusion over the legal boundaries of the decision could unduly discourage dual distribution systems. For example, it would be important to recognize that a discount provided to wholesalers may reflect the value of services that are not obvious on their face (such as assuming credit risks); moreover, the discount would normally include a profit component. Consequently, it should not be sufficient merely to show knowledge on the part of a supplier that the discount exceeds more obvious or readily quantifiable costs, such as transportation expenses. Furthermore, any evaluation of costs, in our view, should operate on a general level without insisting upon detailed cost accounting by a supplier before it may extend a discount. It would not generally be efficient to force a supplier to learn its wholesaler's business in such detail as to be able to evaluate costs with precision. Finally, in light of the fact that the Robinson-Patman Act covers a wide universe of business relations, any cost-based test should be sensitive to particular facts, methods, customs, and understandings that prevail in different commercial environments.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further consideration.

Respectfully submitted.

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AUGUST 1989

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 24

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

* * * * *

[31]

With respect to paragraph 2 (R. 5392), which would forbid Standard from discriminating "[b]y selling such gasoline to any retailer at a price known by [Standard] [32] to be higher than the price at which any wholesaler-purchaser is reselling such gasoline to any retailer who competes with such direct retailer-customer of" Standard, the Commission has determined that it will not seek affirmance of that portion of the order. Paragraph 2 was included for the purpose of relieving what in essence was a "captive market" situation—that is, the inability of the "non-jobber" customers to obtain, either from Standard or from the wholesaler "jobbers," preferential prices which the wholesaler "jobbers" were granting in some instances to their sub-dealers. On the other hand, it was not the purpose of the Commission to require Standard to eliminate legitimate functional pricing or to make it responsible for the pricing practices of its wholesaler "jobbers." Because of the problems necessarily involved in the enforcement of paragraph 2, and in view of the need "to reconcile [an administrative] interpretation, except where Congress

has told us not to, with the broader antitrust policies that have been laid down by Congress" (*Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 74), the Commission has now concluded that other methods (*e.g.*, a proceeding under Section 5 of the Federal Trade Commission Act or under Section 3 of the Clayton Act) would be more appropriate to reach the evil at which paragraph 2 was directed.[28]

* * * * *

The judgment below, we repectfully submit, should be reversed.

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VICTOR R. HANSEN,
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EARL W. KINTNER,
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JAMES E. CORKEY,
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MILES J. BROWN,
Attorney
Federal Trade Commission

NOVEMBER 1957

[28] It should also be noted that the order, even without paragraph 2, forbids discrimination "directly or through any corporate or other device" (R. 5392). Thus, even without paragraph 2, the order is sufficiently broad to preclude Standard from using a subsidiary or "dummy" wholesaler to undercut Standards's tank-wagon customers.

☆ U.S. GOVERNMENT PRINTING OFFICE 1989—241 699/00379

No. 87-2048 (20)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TEXACO INC.,
Petitioner,

—vs.—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR CERTIORARI FILED JUNE 14, 1988
CERTIORARI GRANTED JUNE 12, 1989

515 PP

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HASBROUCK V. TEXACO
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-76-27

RELEVANT DOCKET ENTRIES
IN THE DISTRICT COURT

Docket No.	Date	Description
	1976	
1	1/30	Filed Complaint for Money Damages for Unlawful Price Discrimination, Unfair Methods of Competition, and Injunction
15	8/10	Filed Answer of Defendant Texaco Inc. to Plaintiffs' First Amended Complaint with Affidavit of Mailing
	1977	
91	6/15	Filed Supplemental and Amended Complaint

1978

111 8/3 Filed Answer of Defendant Texaco, Inc. to Plaintiffs' Supplemental and Amended Complaint

1979

188 1/22 Filed (Pltf) Motion for Partial Summary Judgment Striking Texaco's Ninth and Eleventh Affirmative Defenses ("Functional Discount" and Different Line of Commerce) Advisement 5/2/79 S/Callister

189 1/22 Filed Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment Striking Texaco's Ninth and Eleventh Affirmative Defenses ("Functional

Discount" and Different Line of Commerce)

205 1/24 Filed (Pltf) Motion to Dismiss or, in the Alternative for Partial Summary Judgment Striking, Texaco's Ninth and Eleventh Affirmative Defenses ("Functional Discount" and Different Line of Commerce) Advisement 5/2/79 S/Callister

251 2/16 Filed Reply Memorandum of Plaintiffs in Support of Motion to Dismiss or, in the Alternative, for Partial Summary Judgment Striking, Texaco's Ninth and Eleventh Affirmative Defenses ("Functional Discount" and Different Line of Commerce)

425 8/31 Filed Special Verdict Form on Claims of:

Vincent Lies	$100,161.68
Harold Hardwick	42,808.83
Alva N. Blue	44,214.82
John W. Bevan	140,827.35
Ricky Hasbrouck	25,736.75
Henry Rigg	75,827.25
Gene C. Robinson	40,347.51
James O. Sills	54,532.98
Ralph O. Webber	14,487.82
Albert E. Allen	166,916.03
Clifford Robinson	105,568.98
Ricky A. Rigg	38,054.15

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478 3/31 MEMORANDUM DECISION (motion for judgment notwithstanding the verdict is granted; def's motion for new trial is denied; neither party is awarded attorneys fees)

HASBROUCK V. TEXACO
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478 3/31 MEMORANDUM DECISION (motion for judgment notwithstanding the verdict is granted; def's motion for new trial is denied; neither party is awarded attorneys fees)

(Callister) cc: Attorneys COB-32-2

479 3/31 ORDER Granting Judgment Notwithstanding Verdict (deft's motion for new trial is denied; deft's motion for mistrial denied; neither party awarded Attorneys fees & each should bear own costs) (Callister) COB-32-3

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505 3/30 9CCA JUDGMENT (affirmed in part, reversed in part, and remanded in part; costs in this court in favor of

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591	12/21	BRIEF in Support of Pltfs' Motion for Pretrial Determination of Legal Sufficiency of Damage Proof

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633	4/1	AGREED PRETRIAL ORDER (JLQ) cc: Atty Whaley & Nielsen
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		of Ronald Harper is granted; pltfs' motion to exclude deft's immunity defense is granted; pltfs' motion for pre-trial determination of legal sufficiency of pltfs' proof of damages is denied; deft's motion to exclude testimony of Judith O'Brien is denied with leave to renew at trial; deft's motion in limine re background and personal lives of pltfs is denied) (JLQ) cc: Attorneys
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685	6/6	REPORTER'S TRANSCRIPT of Proceedings (6/5/85)

688	6/7	REPORTER'S TRANSCRIPT of Proceedings (6/6/85)
692	6/8	REPORTER'S TRANSCRIPT of Proceedings (6/7/85)
693	6/10	REPORTER'S TRANSCRIPT of Proceedings (6/8/85)
697	6/11	REPORTER'S TRANSCRIPT of Proceedings (6/10/85)
702	6/12	REPORTER'S TRANSCRIPT of Proceedings (6/11/85)
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731 6/22 VERDICT For Pltfs as follows:

	Lost sales & profit on gasoline	Lost sales & profit on backroom business	Total damages
Albert E. Allen	$74,000.00	$3,600.00	$77,600.00
John W. Bevan	55,700.00	7,500.00	63,200.00
Alva N. Blue	34,400.00	2,200.00	36,600.00
Harold C. Hardwick	34,900.00	7,600.00	42,500.00
Rick Hasbrouck	11,700.00	2,400.00	14,100.00
Vincent Lies	34,400.00	5,000.00	39,400.00
Henry Rigg	42,100.00	6,500.00	48,600.00

Ricky A. Rigg	22,000.00	00.00	22,000.00
Mollie J. Robinson	42,900.00	4,600.00	47,500.00
Gene C. Robinson	22,700.00	5,400.00	28,100.00
James O. Sills	22,000.00	00.00	22,000.00
Ralph O. Webber	8,300.00	00.00	8,300.00

Dated this 22nd day of June, 1985. /s/ Margie Williams, Presiding Juror

736 6/25 JUDGMENT on Jury Verdict (pltf Albert E. Allen recover of deft Texaco $232,800., being jury's verdict of $77,600. trebled, with interest at 7.7%; pltf John W. Bevan recover of deft Texaco $189,600., being the jury's verdict of $63,200. trebled, with interest at 7.7%; pltf Alva N. Blue recover of deft Texaco $109,800., being jury's verdict of $36,000. trebled, with interest at 7.7%; pltf Harold C. Hardwick recover of deft Texaco $127,500., being the jury's verdict of $42,500. trebled, with interest at 7.7%; pltf Rick Hasbrouck recover of deft Texaco $42,300., being the

jury's verdict of $14,100. trebled, with interest at 7.7%; pltf Vincent Lies recover of deft Texaco $118,200., being the jury's verdict of $39,400. trebled, with interest at 7.7%; pltf Henry Rigg recover of deft Texaco $145,800., being jury's verdict of $48,600. trebled, with interest at 7.7%; pltf Ricky A. Rigg recover of deft Texaco $66,000., being jury's verdict of $22,000. trebled, with interest at 7.7%; pltf Mollie J. Robinson, Personal Representative of the Estate of Clifford N. Robinson, Deceased recover of deft Texaco $142,500., being jury's verdict of $47,500. trebled,

with interest at 7.7%; pltf Gene C. Robinson recover of deft Texaco $84,300., being jury's verdict of $28,100. trebled, with interest at 7.7%; pltf James O. Sills recover of deft Texaco $66,000., being jury's verdict of $22,000. trebled, with interest at 7.7%; pltf Ralph O. Webber recover of deft Texaco $24,900., being jury's verdict of $8,300. trebled, with interest at 7.7%; all costs and attorneys fees to be determined by the Court. COB-62-12 cc: Attorneys

739	7/5	DEFT'S MOTION for Judgment NOV or, in the Alternative, a New Trial 8/14/85 S/JLQ Den.
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804	10/10	NOTICE OF APPEAL (deft atty Nielsen) cc's 9CCA, attys Whaley, Ebel, Nielsen, Robinson & Sacks [w/affidavit of mailing]

RELEVANT DOCKET ENTRIES IN THE COURT OF APPEALS

HASBROUCK V. TEXACO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 80-3160

Docket No.	Date	Description
	1981	
	12/14	Opinion of the Court of Appeals
	1982	
	2/16	Order denying Texaco's petition for rehearing

TEXACO V. HASBROUCK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 85-4225

Docket No.	Date	Description
	1987	
	10/26	Judgment
	1988	
	3/17	Order and Amended Opinion

HASBROUCK V. TEXACO
AGREED PRETRIAL ORDER
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-76-27

A pretrial conference was held in the above-entitled cause at Spokane, Washington, on February 1, 1985, with Judge Justin L. Quackenbush presiding. Plaintiffs were represented by Robert H. Whaley, and defendant Texaco Inc. ("Texaco") by Wm. Fremming Nielsen and Mark D. Litvack, their respective attorneys of record. The following pretrial order has been formulated and settled as follows:

NATURE OF PROCEEDINGS AND

STATEMENT OF JURISDICTION

Plaintiffs' Supplemental and Amended Complaint, filed herein on June 15, 1978, alleges causes of action under the Robinson-Patman Act, 15 U.S.C. § 13(a), the Washington Unfair Practices Act, Revised Code of Washington, Chapter

19.90, and the Washington Consumer Protection Act, Revised Code of Washington, Chapter 19.86. The causes of action based upon violations of state law were discussed in the prior trial of this case. This case is now proceeding to trial only under the federal cause of action, being 15 U.S.C. § 13(a). This Court has jurisdiction of these claims by virtue of 15 U.S.C. § 15 and 28 U.S.C. § 1332.

ADMITTED FACTS

The following facts are agreed upon by the parties and require no proof:

1. Texaco is an integrated petroleum company, incorporated under the laws of Delaware and engaged in the refining, distribution and marketing of petroleum products, including gasoline.

2. Texaco was and is engaged in the marketing of petroleum products in

parts of the United States and in certain foreign countries.

3. In the Spokane area, Texaco sold gasoline to plaintiffs, to other persons who have resold Texaco gasoline at retail, to John Dompier Oil Company ("Dompier") and to Gull Oil Company ("Gull").

4. The gross profit earned from sales of gasoline by a person who sells gasoline at retail is a function of the number of gallons he sells times his gross profit margin per gallon.

5. During all or part of the period January 1, 1972 through April 1981, hereinafter the relevant time period, each of the plaintiffs was a citizen and resident of the State of Washington and operated a retail gasoline service station in Spokane County, Washington.

6. Each of the plaintiffs operated Texaco retail gasoline stations for the following periods:

Operator	Date	Place
RICK HASBROUCK (Rick's Texaco)	6/71 - 10/6/75	Driscoll & "C" St.
JAMES O. SILLS (Jim's Springhill Texaco Service)	10/61 - 10/29/78	Garland and Ash
ALVA N. BLUE (Al Blue's Texaco)	7/71 - 4/30/81	Maple and Rowan
JOHN W. BEVAN (Bevan's Texaco and Towing and Bevan's Northwood Texaco)	6/67 - 6/1/78 8/56 - 11/30/75	3rd & Lincoln Wall & Houston
RICKY A. RIGG (Five Mile Texaco)		West Francis
CLIFFORD N. ROBINSON (Robinson's Freeway Texaco)	1955 to 9/77	I-90 & Medical Lake

Operator	Date	Place
GENE C. ROBINSON (Hillyard Texaco)	1956 - 1979	Market & Wellsley
ALBERT E. ALLEN (Van's Texaco)	1966 - 5/19/81	N.W. Boulevard
HAROLD C. HARDWICK (Harold's Texaco Service and Towing)	10/59 - 3/78	North Division
HENRY RIGG (Hank's Texaco)	1954 - 1980	Sharp & Monroe
VINCENT LIES (Lies Texaco & U-Haul)	1968 - 5/24/81	3rd & Maple
RALPH O. WEBBER (Webber's Auto Repair & Service Station)	9/65 - 9/79	Hamilton & Baldwin

7. During the above periods of time, each of the plaintiffs purchased regular, premium and/or unleaded gasoline from Texaco and resold said gasoline at retail.

8. Throughout the relevant time period, Dompier purchased regular, premium and/or unleaded gasoline from Texaco, and under its contract with Texaco, Dompier was licensed to sell all of this gasoline under the Texaco trademark.

9. Throughout the relevant time period, Gull purchased regular, premium and/or unleaded gasoline from Texaco. However, during the entire relevant time period Gull never sold gasoline under the Texaco trademark.

10. Throughout the relevant time period, Texaco directly supplied branded gasoline to plaintiffs at various times.

11. Throughout the relevant time period, Texaco supplied branded gasoline to Dompier at various times.

12. Throughout the relevant time period, Texaco supplied unbranded gasoline to Gull at various times. The prices charged by Texaco to Gull for such gasoline varied from time to time. The price charged to Gull for such gasoline was never static.

13. During the relevant time period, Dompier supplied gasoline to retail service stations at various times and prices.

14. During part of the period January 1, 1972 through April 1981, Dompier supplied gasoline to car washes operated by Red Carpet at various times and prices.

15. Throughout the relevant time period, the prices Dompier charged to the retail service stations and car

washes to which Dompier supplied gasoline were set by Dompier.

16. Throughout the relevant time period, Gull supplied gasoline to retail service stations at various times and prices.

17. Throughout the relevant time period, the prices Gull charged to the retail service stations to which it supplied gasoline were set by Gull.

18. Gull resold part of the gasoline it purchased from Texaco at retail service stations owned by it, and also resold part of the gasoline it purchased from Texaco to others who resold the gasoline at retail.

18A. Before July 1, 1970, Gull was supplied by Phillips Petroleum in Eastern Washington.

19. The gasoline which Texaco sold to plaintiffs and Dompier Co. was, in

all physical and chemical respects, of like grade and quality.

20. The Texaco Retailer Tankwagon price (RTW) is the price which Texaco charged retail service station dealers to whom it sells directly, absent any allowances off the RTW.

21. Since at least 1968, Dompier Co. has purchased gasoline from Texaco at prices which were lower than Texaco's RTW.

22. Since at least 1970, Gull Oil Co. has purchased gasoline from Texaco at prices which were lower than Texaco's RTW.

23. Texaco also paid Dompier Co. an allowance, termed a "hauling allowance," for each gallon of gasoline which Dompier Co. purchased from Texaco, as follows:

Time Period	Amount of Hauling Allowance per Gallon
June 1, 1971–April 2, 1972	.00446
April 3, 1972–August 31, 1972	.00445
September 1, 1972–August 12, 1973	.00478
August 13, 1973–March 9, 1974	.00511
March 10, 1974–July 19, 1974	.00544
July 20, 1974–August 31, 1975	.00587
September 1, 1975–June 11, 1976	.00616
June 12, 1976–August 31, 1976	.00644
September 1, 1976–July 8, 1977	.0067
July 9, 1977–April 14, 1978	.00714
April 15, 1978–June, 1979	.00724

Texaco will determine the hauling allowance for the period thereafter and the parties will agree to that amount.

24. The hauling allowance has been paid by Texaco to Dompier Oil Co. for the time periods indicated above.

25. The following were the approximate differences between the contract prices of Dompier Co. and Texaco's Retailer Tankwagon price (exclusive of general allowances in effect during the period January to December, 1972):

Time Period	Amount of Price Differences per Gallon Sky	Fire	Non-Lead
January 1, 1972-May 22, 1973	*.0395	*.0395	
May 22, 1973-July 31,1974	*.0365	*.0365	
August 1, 1974-December 2, 1975	*.0395	*.0395	
December 3, 1975-January 28, 1977	.0365	.0365	.0385
January 28, 1977-June 1979	.0265	.0265	.0285

* All include .003 special allowance. None of these figures reflect the .01 allowance to Allen, Rigg and Weber.

The parties will agree to the price for the period thereafter.

26. The following were the approximate differences between the prices paid by Gull and Texaco's Retail Tankwagon price:

Time Period	Amount of Price Differences per Gallon		
	Fire	Sky	Nonlead
January, 1973–June 12, 1974	.0525	.0575	--
June 13, 1974–July 9, 1974	.0525	.0575	.0575
July 10, 1974–June 9, 1977	.0525	.0575	.0545
June 10, 1977–July 18, 1979	*	*	*

* Gull prices changed to discount off DTW as follows: Sky: .0298; Fire: .0173; Non-Lead: .0173. The discount off of RTW based on new policy for Gull as follows: Sky: .0593; Fire: .0438; and Non-Lead: .0458.

27. During the time period (from January 1, 1972, through October 30, 1972) Texaco extended "temporary competitive allowances" to plaintiffs, Dompier Oil Co. and Gull. These competitive allowances varied. These temporary competitive allowances also had the effect that in every instance in which the allowance was granted, it reduced the recipient's buying price for the gasoline it purchased from Texaco.

28. As of April, 1981, Dompier Oil Co. operated ______ Texaco-branded stations in the Spokane area.

29. During the relevant time period Dompier Oil Co. supplied the following service stations with Texaco-branded gasoline:

Location	Dates
North 502 Freya	
North 3306 Monroe	
Mission & Magnolia	

Location	Dates
North 2924 Market	
East 303 Third Avenue	
Hayford Road & Highway 2, Airway Heights	
North 2527 Division (Red Carpet No. 1)	
E. 7208 Sprague Avenue (Red Carpet No. 2)	
East 303 Third Avenue	
Newport Highway	
North 7902 Division	
Hayford Road & Highway 2, Airway Heights	
Red Carpet No. 1, North 2527 Division	
Red Carpet No. 2, East 7208 Sprague	
North 2924 Market	
Mission & Magnolia Boulevard	
North 502 Freya	
North 3306 Monroe	

30. During the relative time period Gull supplied the following stations with gasoline:

Location	Dates
East 620 Francis	
Newport Hwy., Mead	
East 13819 Trent	
East 511 Francis	
North 2103 Division	
East 5204 Sprague	
North 1521 Argonne	
South 2805 Grand	
East 8006 Sprague	
East 4422 Sprague	
South 3728 Grand	
Newport Hwy., Mead	
East 936 Sprague	
1106 North Pines Road	
East 706 Main Street, Cheney	
Route 1, Medical Lake	

31. As of June, 1979, all Gull stations in Spokane were operated by

individuals who were paid a commission by Gull for each gallon of gasoline sold through the station.

32. During the relevant time period, Gull was solely responsible for establishing the retail price at which gasoline was sold to the public at its commission stations.

33. Throughout the relevant time period, Gull had no bulk plant in the Spokane area.

34. During the relevant time period, Texaco granted a one cent allowance to A. Allen, H. Rigg and R. Webber.

* * *

HASBROUCK V. TEXACO

TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. C-76-27

[ALBERT E. ALLEN, R. 405]

* * *

Q. Okay. At this time, during the 1970's let me say generally, to your observation, was price an important factor in selling gasoline in Spokane?

A. Definitely.

Q. Okay. If you had had a buying price at the time of this competition from the Dompier stations emerged, you had a lower buying price, let's say three or four cents lower, what would you have done that-- A. I would have met the competition.

Q. And specifically what does that mean, you would have passed it on to the retailing public? A. If it would have

been necessary for me to drop my price to meet competition, I would have done so.

Q. Do you have any judgment as to whether you would have done that, that would have had an effect on the number of gallons you were able to sell?

A. Yes, it would have.

Q. What would that effect have been?

A. Pardon?

Q. What effect would that have had?

[Allen, R. 406] **A.** On my gallonage?

Q. Yes. **A.** I would have kept it or gained.

Q. You didn't have a lower buying price. Did you try to do anything else in order to help you compete with these other stations? **A.** Yes, I did. In 1976 I think it was that I--my brother and I contacted Safeway and we bought--or we bought three trucks and I was going to take one. Then I contacted

Leland Trailers and they located a trailer for me. And I thought that if I hauled my own gasoline, I could compete with Dompier Oil Company, to be frank with you. And after I had made those arrangements, I went out and I talked to Morrie, and he told me I definitely could not get my gasoline at the rack.

Q. Let me just stop you here because I think you are using some terms that people may not be familiar with. Morrie again is Mr. Peterson? **A.** Morrie Peterson at the bulk plant, yes.

Q. And you bought, you said, a truck and trailer. Is that one of these great big rigs to carry gasoline? **A.** Yes, it is.

Q. And you said you wanted to buy it at the rack. **[Allen, R. 407]** What do you mean by that? **A.** That is at the bulk plant, at the pipeline.

Q. So you wanted to take your truck that you were buying right out to the pipeline terminal and get the gasoline yourself and take it to your station? **A.** Yes, I did. At the volume of gasoline that I used to sell, it would have been profitable for me.

Q. Were you with your pricing philosophy, did you sell a lot of gallons of gasoline in the early Seventies? **A.** Yes, I did, I sold 100,000, 120,000, in the early--late Sixties, and early Seventies.

Q. Did you sell that much after these other stations--

THE COURT: Excuse me just a moment. 100,000 to 120,000 how often?

THE WITNESS: A month.

THE COURT: Well, speak into the--

A. A month.

Q. (BY MR. EBEL) Excuse me. I thought you had said that. All right, did you

sell that much in the period of the early Seventies when you began to be faced with this competition from these other stations we have been talking about? **A.** No.

[Allen, R. 408] **Q.** Let's go back to the truck and trailer a moment. Why did you think that being able to take your truck out to the pipeline terminal was going to help you get a better price? **A.** Well, if I could have got it at the three or four cents cheaper, I could have met competition.

Q. Did John Dompier Oil Company pick up its gasoline at the terminal? **A.** Yes, they do.

Q. And Texaco would not permit you to do this? **A.** They would not permit me to do that.

* * *

[RICKY RIGG, R. 488]

* * *

Q. Mr. Rigg, your name is Rick, is that correct? A. Right.

[Rigg, R. 489] Q. You are the son of Hank Rigg? A. Yes, sir.

Q. Have you worked with your father in the service station business in the past? A. Yes, I have.

Q. Would you tell the jury briefly about the time that you worked with your father and point out the station that you worked at? Could we move to the first map and look at the map of Spokane? A. When I first started working with my father?

Q. Yes. I would like you to point the station out to the jury and tell us when you started working with your father. A. My mother said I started washing hubcaps because I couldn't reach the

windows when I was real little at Tidewater, Greenacres.

Q. When did you start working on Monroe Street and Sharp? A. Okay. My dad acquired a station in 1954 on Monroe and Sharp. Do you want me to point it out?

Q. Yes, would you point it out to the jury? A. Approximately right there (indicating). We started in 1954.

Q. When did you start working there? A. Off and on while I was in school, after school, [Rigg, R. 490] summer vacations, then I started full time approximately '65, working full time, '64-65.

Q. And you worked in his station full time until when? A. Until January 1973.

Q. Then you moved into your own station? A. I moved to Francis and Ash.

Q. When you worked with your father in the station on Monroe Street. Would you tell the jury briefly what kind of

station it was, describe it for them? **A.** It was a full service Texaco. We had--we sold gas, naturally. We did back room work, lube room work, we serviced cars, lube, oil filters, tune-ups, brakes, light repair work. We didn't do engine overhaul or stuff like that, we just did light repair work.

Q. You left your father's station in 1973? **A.** Correct.

Q. Were there any changes in the market you noticed in the early Seventies while you were working at your father's station? **A.** Yes, there was.

Q. Would you tell the jury what change you noticed? **A.** The change I noticed was the Texaco at the foot of Monroe Street hill, Alice, opened, and they were **[Rigg, R. 491]** selling gas for less than we could. In fact, when they first opened up, it was three-tenths of a cent over our buying price.

Q. Three-tenths of a cent above your buying price? **A.** Right.

Q. Do you recall that station opening up? **A.** Yeah, I do because I was talking to Tom Bollinger from Texaco because my customers had heard through the grapevine--

MR. NIELSEN: Your Honor, I object to any customer grapevine conversation.

THE COURT: Sustained.

Q. (BY MR. WHALEY) You learned that there may be a station opening up on Monroe? **A.** I learned that there was going to be a station opened on Monroe. I went past it on my way to work. I went past it every day on my way home from work.

Q. Did you then have a conversation with Mr. Bollinger? **A.** Yes, I had a conversation with Mr. Bollinger. I wanted to find out--

Q. Let me ask you the questions and you answer me, and I can get the necessary question. You had a conversation with Mr. Bollinger, is that correct? A. Yes, I did.

[Rigg, R. 492] Q. Who is Mr. Bollinger? A. Bollinger was--I believe his title was district manager of Texaco in the Spokane area.

Q. About what time did you have that conversation with Mr. Bollinger? A. It was in the early Seventies.

Q. Can you tell us the conversation you had with Mr. Bollinger, what was the substance of the conversation? A. I asked him if that was going to be a Texaco or not. He told me definitely it was not going to be a Texaco service station.

Q. And then do you remember the station opening up? A. Yes, I did.

Q. What kind of station was it? A. It was Texaco.

Q. Did you notice the price posted at that station? A. It was less than mine.

Q. And do you remember how it was in relationship to the price you were paying for gasoline? A. It was less than mine.

Q. Do you have any recollection of how close to--

MR. NIELSEN: Your Honor, I object unless we have more pinpointed as to time and dates. He is being very general.

THE COURT: I will allow you to examine on [Rigg, R. 493] cross. Overruled.

Q. (BY MR. WHALEY) I am talking about when the station opened up. A. Right, which was in the early Seventies, I believe.

Q. And about what was the difference between their sale price and your buying price? **A.** The difference in their selling price and my buying price?

Q. Yes. **A.** When it first opened it was three-tenths of a cent over my buying price.

Q. Did you ever notice any customers of yours that traded at that station? A. Yes, I have.

Q. Would you tell the jury what you observed about your customers in that station? **A.** Okay. Because I drove past it going to work and drove past it going home from work, I noticed several of my customers at different intervals. Specific names I can't come up with now that were purchasing product from that Texaco.

Q. Did you ever have any customers come into your station and complain or tell you about the price at the station up

the street? **[Rigg, R. 494]** **A.** Yes, I had many.

Q. Would you show the jury where your station is in relationship to the station farther up the street at the base of the Monroe Street hill? **A.** I am just below them. That's where I am at, and they were right at the foot of the Monroe Street hill, approximately, I believe, right about in here.

Q. Were they on the same side of the street that you were? **A.** Same side.

Q. Did they have the same kind of Texaco sign? **A.** Same kind of sign.

Q. Did they take the same credit card? A. They took the same credit card.

Q. Did the station pump the gas for the purchaser? **A.** They pumped the gas.

Q. Did you ever try while you were in the Monroe Street station to price close to the price of that station up the

street? **A.** I continuously tried to price as close as I could to it.

Q. How close did you try to price to that station in the early Seventies? **A.** One day I went to work I was upset about their price, I got my father, I sat down with him and we **[Rigg, R. 495]** discussed about taking our dealer tank wagon price we paid, I added our rent, anything into that price and posted that at the gas pumps.

MR. NIELSEN: Your Honor, if we could have dates it would help. I object to just general statements unless we can pinpoint them with a little better foundation.

THE COURT: Yes, you might attempt to set the time frame.

Q. (BY MR. WHALEY) Until I tell you further, I am going to be talking about the early 1970's. **A.** Early 1970's.

Q. That would be before 1973. **A.** Correct.

Q. During that period of time did you ever try to price competitively with that station? **A.** I continually tried to price competitive.

Q. The time that you talked about dropping your price down to your purchase price, plus your rent, did that occur prior to 1973? **A.** Yes.

Q. Could you make any money charging at your purchase price plus your rent? **A.** No.

Q. Did you have any profit when you did that? **[Rigg, R. 496]** **A.** No, absolutely none.

Q. When you otherwise priced in the early 1970's, pre-1970, how close in general did you try to stay to that station? **A.** What I would do is take my dealer tank wagon price, add the rent to

it, and then add three cents for profit margin.

Q. So, you were trying to operate on a three cent profit margin? **A.** Right.

Q. What happened to your gasoline sales during this period of time?

MR. NIELSEN: Your Honor, sorry to interrupt. He is talking about the early 1970's, apparently before 1973, and he is talking about prices and his efforts to compete. It's not relevant because that precedes the damage period in this case, and we are going far beyond just background introductory type evidence. It concerns me for that reason.

THE COURT: The damage period is--

MR. NIELSEN: It starts in '72.

THE COURT: Yes. What date?

MR. WHALEY: It starts on January 30, 1972.

THE COURT: Why don't you focus the witness's attention to those dates?

[Rigg, R. 497] MR. WHALEY: Your Honor, I think I have to show a pattern that begins before that because that's what begins the--

THE COURT: Yes. I will be instructing the jury that the damage period is limited to the period commencing January 30, '72, but I will allow some historical information as to what went on at Alice and Monroe in comparison to other stations.

Q. **(BY MR. WHALEY)** Mr. Rigg, did you later on change stations and open another station? **A.** Yes, I did.

Q. Would you tell us how you came about opening another station? **A.** Well, I was trying to--I lived up in the Francis--looking in the Francis area, watched that station up there. I lived in that area. I lived by Shadle at that

time. It looked like a fairly nice residential area and a couple busy streets. One of the Texaco sales reps came to me and told me that the station at Francis and Ash was available. I told him I would take it.

Q. Did you move up there and start a full service station? **A.** Yes.

Q. Did you at that point consider the station on the **[Rigg, R. 498]** Monroe Street hill also to be in competition with you? **A.** Yes, I did.

Q. What did you consider your competitive area to be when you were at the Monroe Street station and when you moved up to Francis? **A.** My competitive area?

Q. Yes, sir. **A.** All of Spokane.

Q. Did you have any particular competition that you thought was more significant than others? **A.** The competition that I thought which would

be more significant would be my same brand, took the same credit card and sold the same products.

Q. So that would include Mr. Allen, for instance? **A.** Correct.

Q. Or Mr. Bevan? **A.** Correct.

Q. Mr. Lies? **A.** Right.

Q. When you were in that station, how did you do running it as a full-serve station? **A.** Do you mean did I feel like I was successful?

Q. Did you have to change the operation? **A.** As a full service? Okay. I ran that station basically the same way we did the Monroe Street.

[Rigg, R. 499] Q. Did you end up having to change the operation of the station? **A.** Towards the end I changed it to self-serve.

Q. Tell the jury how you came to change the station to a self-serve station. **A.** I figured by changing to self-serve,

I would be able to cut my overhead down so that working on a small margin I would be able to survive. I let all my help go so I did it all by myself. I believe I had one part-time man for Sundays, and I changed the lube rooms. I closed those up and changed those into a pop shop, tried selling pop, and I retained my U-Haul business.

Q. Basically at that point you did it as a strictly self-serve unit?

A. Strictly self-serve.

Q. When did you change it into a self-serve unit? A. Approximately 1976, '77--'76.

* * *

[Rigg, R. 501]

* * *

Q. When you went self-serve, what kind of margin did you try to post? A. The same, three cents.

Q. And were you able to sell enough gas to stay in business? **[Rigg, R. 502]**

A. No, sir.

Q. And did you get a better price from Texaco when you went self-serve? A. No difference.

Q. You still paid retail tank wagon?

A. Correct.

Q. Did you find that you were able to be competitive with other self-serve stations when you were selling Texaco gas in that station? A. Overall I was competitive with the other brands.

Q. Were you competitive in the Texaco brand? A. No.

Q. Was your price above the price of the Monroe Street station, the Texaco station at the base of the Monroe Street hill, were you pricing above that?

A. My price was higher, yes.

Q. Could you price at the price of that station-- A. No.

Q. --and make any profit? A. No.

Q. Did you ask Texaco for a better price when you went self service? A. Yes.

Q. Who did you talk to? A. Vogelman. I believe it was Vogelman.

[Rigg, R. 503] Q. What did he say to you? A. Things just went the way they were, like they have always gone. I was rejected.

Q. Have you ever had a conversation with anybody from Texaco about obtaining a tractor-trailer and hauling your own product and getting a better price? A. Yes, I did at a breakfast meeting with Tom Bollinger.

Q. Would you tell the jury about when that conversation occurred? A. That conversation occurred--I was still at the Monroe Street station when that conversation took place, so that would be prior to 1973, during that time frame.

Q. Can you tell the jury what you asked at that time of Mr. Bollinger? A. We tried to see if we could buy a truck and haul our own product just like the other distributors did so that we could pay less for the product, reduce our retail price.

Q. Were you permitted to do that? A. No, we weren't. It was rejected.

* * *

[Rigg, R. 507]

* * *

Q. Why did you leave that station in 1977? A. Well, I was kind of discouraged about the way the market and the way things were going. I wasn't making it, I couldn't make it profit-wise.

Q. Would you tell the jury who Mr. Vogelman is and Mr. Bollinger is that you testified to previously? A. Mr. Bollinger was in charge of the Spokane area. I believe he was a

district manager, is what his title was. Vogelman through the years at times was a sales representative from Texaco, and there was a period of time when he was the head of the TBA, tires, batteries and accessories.

Q. Did you have any Gull stations that were operating in the area that you serviced? A. Yes, I did.

Q. Where were they located? A. There was two of them located approximately in the east 500 block of Francis about the Fred Meyer [Rigg, R. 508] store.

Q. That would be east of you? A. East of me.

Q. About how far? A. I was in the 1700 block, so it would be 22 blocks.

Q. And were they on both sides of Francis? A. Both sides of the street, almost across from each other.

Q. Did you consider those stations to be in your competitive area? A. Yes, sir, I did.

Q. Did you consider them to be as important in competition with you as a Texaco brand? A. No.

Q. They were part of the unbranded market? A. Right.

MR. WHALEY: That's all.

* * *

[Rigg, R. 512]

* * *

Q. Did you observe as a member of the industry a lot of changes and occurrences happening here that in some way revolutionized or altered the traditional way of marketing gasoline that you had grown up with? A. Yes, things changed.

Q. There were a lot of changes weren't there? A. Like what? Excuse me.

Q. I have in mind the fact that supplies of gas were sometimes adjusted, were they not? A. Supplies?

Q. Supplies. A. Well--

Q. The availability of gas was not always the same as it had been before, isn't that true? A. That's true.

[Rigg, R. 513] Q. And there was coming into the market a new style of selling gas, was there not, Mr. Rigg, a style that was represented by self service that you recognized in 1976, isn't that correct? A. Correct.

Q. In other words, self service hadn't been a popular way to sell gas when you were growing up in the 1960's down at your father's station on Monroe and Sharp, isn't that correct? A. In the Sixties?

Q. Yes. Self service wasn't a popular way to sell gas in the Sixties, that was

a new advent that occurred in the 1970's? A. Right.

Q. And it was gaining momentum during the time you were operating that station in '73, '77 out on North Ash and Francis, isn't that a fair generalization? A. Fair generalization.

* * *

[Rigg, R. 523]

* * *

Q. You testified that you were unable to lower your margin when you went self-serve from three cents. Why was that? A. There wasn't anything there to lower, to live on. I got a family to feed, too. I can't--I couldn't drop any more.

Q. What would happen if you lowered your margin any further? A. If I lowered the margin any further? How would I eat?

Q. Could you make a sufficient profit to stay in business? A. No.

* * *

[H. Rigg, R. 540]

* * *

Q. During the years 1970 to 1976, did you gain some new customers because certain people wanted full-serve and not self-serve? A. I had some of them make this remark, but very few; the older people especially and the women.

Q. During the time that you were in the service station, is it true, sir, there was a trend in this area away from full-serve and towards self-serve? A. Yes.

* * *

Q. (BY MR. ROBINSON) Talk about this trend that went from full-serve to self-serve? [H. Rigg, R. 541] A. Yes.

Q. Did that trend hurt all the full-serve stations? A. I wouldn't

know about anybody but me and I would say, yes, it did.

* * *

[O.W. MILLER, R. 558]

* * *

DIRECT EXAMINATION

BY MR. EBEL:

Q. Would you state your name and address? This is on page two. A. O. W. Miller, 3868 Elmer Road, Grants Pass Oregon.

Q. Are you presently employed by anyone? A. No, sir.

Q. You are retired?

[R. 559] A. Right.

Q. From the Texaco Company? A. Right.

Q. How long did you work for Texaco before your retirement? A. Approximately 30 years.

Q. How old are you? A. 63. I will be 64 on September the 18th.

Q. What was the date of your retirement? **A.** November 1st, 1975.

Q. At that time what job did you hold with Texaco? **A.** Assistant regional manager, wholesale sales.

Q. How long did you hold that job? **A.** In the Portland region since, I believe, June 1st, 1971.

Q. Could you explain what your functions were as assistant regional manager of wholesale sales? **A.** I was responsible for wholesaler relations.

Q. What specifically did that include? **A.** Generally calling on the trade, negotiation of certain contracts, maintaining the proper relationship between the company and the wholesaler class.

* * *

[Miller, R. 569]

* * *

Q. Did you in the course of your duties make investigations to determine whether somebody buying at the distributor price was in fact performing true distributor functions? **A.** Yes, sir.

Q. What kind of investigations did you make? **A.** There was the usual field investigation, and in a number of cases I was personally acquainted with the wholesaler and had a general knowledge of his activities.

Q. Did you make any such investigation of the activities of John Dompier Oil Company? **A.** Yes.

Q. And when you say he had to be a true wholesaler to qualify for this discount, are you intending to say that if he was something else, for example a retailer, that he would not qualify for the discount? **A.** He wouldn't qualify for

the discount as a [Miller, R. 570] retailer.

Q. Do you know of any occasion when Texaco ever stopped selling at a discount to someone labeled a distributor because he no longer was a true wholesaler, as you described it? A. I don't recall any cases.

Q. In the course of your job, you would have known about any such instances in your geographical area, wouldn't that be true? A. I am sure I would.

Q. You said that you made field investigations and that you made investigations as to John Dompier Oil Company. Can you describe what was involved in this or these field investigations. A. Well, generally a visit to the distributor's place of business or contact with the district manager who is familiar through his

organization of the activities of the accounts within his area.

Q. Did you know during this period of time that the John Dompier Oil Company was itself operating retail service stations? A. No.

Q. That was never revealed to you by your investigation? A. No.

[Miller, R. 571] Q. Had you known that fact, would that have made a difference to you in terms of whether John Dompier Oil Company qualified to receive the distributor discount? A. No.

Q. Why not. * * * A. John Dompier would still have been required to perform various functions that he would under any other ordinary circumstances plus some additional ones.

Q. As I understand it then, the fact that a person buying under a distributor contract and receiving a discount was operating himself retail service

stations didn't make any difference to Texaco insofar as his continuing to get the discount for gasoline sold through those service stations? **A.** To begin with, John, I don't know that he operated stations himself. But whether he did or not would have no bearing on the case. We can't tell him how he disposes of product once he purchases it.

Q. The question is not what you can or can't do, but whether that was something that you took into account in determining whether he got the discount or not. And I gather that it was not something? **[Miller, R. 572]** **A.** It was never considered.

Q. Now, whether or not you knew that John Dompier was doing this, were you aware that some distributors in your region were doing this; that is, operating their own retail stations?

A. I don't really remember their method of operation.

Q. You don't have any present memory of any distributor ever doing that? **A.** No, I don't.

* * *

Q. When is the last time you talked to either John Dompier or Neil Dompier? **A.** It would have been in September 1975.

Q. Within your region, which I guess covers five or six states, did all of the distributors receive the same discount off the retailer tank wagon price? **A.** No, sir.

Q. It was generally true, wasn't it, that the discount was the same for all distributors? **A.** Are you talking about this geographical region?

Q. Yes, sir. **A.** No, it is not generally true.

Q. * * * In 1972 and '73 was it the policy of Texaco **[Miller, R. 573]** to

encourage its distributors to obtain new retail business? **A.** 1972 and '73?

Q. Yes, sir. **A.** No.

Q. Was that the policy in 1972? **A.** Perhaps early '72. I again--my memory isn't all that good.

Q. The distributors' stations received the temporary competitive allowances from Texaco, did they not? **A.** Distributor stations?

Q. Yes, sir, distributor supplied stations. **A.** No.

Q. Do you know what a temporary competitive allowance is? **A.** Yes.

Q. The distributor received his allowance depending on the price at the stations he supplied, did he not? **A.** He may have.

Q. Well, did he? **A.** If he provided the necessary evidence, he could have received an allowance.

Q. They were eligible for it, weren't they? **A.** Providing it was bona fide competitive evidence, yes.

[Miller, R. 574] **Q.** And that had to be evidence with respect to the specific station that he supplied, did it not? **A.** Competitive evidence in the area in which that station may have been located.

Q. But the evidence related to a particular station of his, correct? **A.** I believe that is correct.

Q. And wasn't it at least in 1972 or 1971, a rather routine occurrence that temporary competitive allowances were extended to all kinds of retail stations? **A.** I don't think it was ever routine.

Q. Well, what I mean, and perhaps routine isn't the correct word, but it was not an unusual occurrence that that happened, was it? **A.** No. It would not

have been unusual back in that period of time.

Q. And it is also correct, isn't it, that by that process you became aware of the locations of stations which the distributor supplied? A. Yes. We would have been aware, someone in our company would have been aware of those locations.

Q. Do you recall a program called the Fill the Gap program? A. I surely do.

[Miller, R. 575] Q. Can you tell me what that was? A. Well, it was a program by which we encouraged our wholesalers to develop additional retail representation in areas where we felt we didn't provide adequate availability of product to the motoring public.

Q. What if anything did Texaco do to encourage distributors to get that additional retail representation? A. We offered the assistance of our

salaried personnel in providing advice in doing the leg work. I believe that at one time we may have offered plans, engineering service, and we also offered financing through our leases where the location would justify it, and the financial condition of the wholesaler warranted it.

Q. Was there also a program called the Wholesaler's Glitter Program? A. Yes, sir.

Q. Explain generally what the purpose of that was. A. The purpose of that was to encourage wholesalers to be better business people.

Q. Did that include helping the wholesalers to improve the appearance of their retail stations? A. I believe it included that, yes.

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[Miller, R. 586]

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Q. (BY MR. EBEL) Exhibit 12 is concerning 1972 wholesale objectives?

A. Right.

Q. And your first objective is to exceed all sales department product goals? A. Right.

Q. And generally when you say wholesale objectives, you mean objectives for selling to wholesalers, is that what you are referring to? A. No.

Q. When you say, "exceed all sales department product goals," you mean sales goals, don't you, for sales to wholesalers? A. To wholesalers, yes.

Q. Including distributors? A. Yes.

Q. The third item on the district objectives is, "Analyze or update each wholesaler market analysis by June 30, 1972." Can you explain what that wholesaler market analysis refers to?

A. I believe that was a program we had for assisting **[Miller, R. 587]** the wholesaler to improve his volume and revenue and profits and generally applicable, as I recall, to consignees.

Q. And in item four you say, "Secure new Fill the Gap service station," and then you have a list of various areas, and in Spokane you have the number three. Does that mean that your goal was to find three new service stations?

A. In the Spokane district.

Q. Right. And those were to be serviced by wholesalers? A. That is correct.

Q. Was it your responsibility to see that these objectives were carried out?

A. Yes.

* * *

[Miller, R. 588]

* * *

Q. In the year 1975, Mr. Miller, did you become aware of the fact that John Dompier Oil Company was [Miller, R. 589] operating its own retail service stations? A. No.

Q. When if ever is the first time you learned of that? A. I don't recall ever being aware that they were operating their own stations.

Q. Did you from time to time meet with Mr. Bowman and Mr. Vogelman? A. Not beyond seeing them at such time as I would visit the Spokane office and perhaps then it would be only to say hello and have a cup of coffee or something.

Q. Did Mr. Vogelman ever complain to you about the fact that Dompier had begun operating several service stations? A. Not to my recollection.

Q. Or that Dompier's volume had significantly increased in comparison to independent retailers in Spokane? A. I certainly don't remember it.

Q. Do you recall ever hearing about a situation like that anywhere within your region? A. No.

Q. You said earlier you made an investigation as to whether persons were continuing to be true [Miller, R. 590] wholesalers to qualify for this wholesale discount. Is it correct that your investigation did not include any investigation as to whether they were operating their own stations? A. True.

Q. Is it true that your investigation did not include that? A. Did not include that.

Q. When did you retire again? A. November 1st, 1975.

* * *

Q. Well, you said you didn't make any investigation as to whether a distributor was operating a retail [Miller, R. 591] station on his own, correct? A. Yes.

Q. And I think you said you didn't even know that the Dompier Company was doing that, is that also correct? A. Right.

Q. So, would it also be correct that you didn't make any effort to figure out where such stations were located? A. Only in a general way to have some general idea of whether or not we had adequate representation in an area.

Q. Did you make any investigation to figure out whether stations were hurting each other because they were too close? A. No.

Q. * * * Do you know the reasons why Texaco engaged in dual distribution in Spokane rather than simply engaging in

only one kind of distribution? A. I can make an assumption.

Q. I don't want an assumption, I want to know if you know why. A. No, I don't know why. * * *

[Miller, R. 592] * * * A. Well, certainly we wanted to obtain our reasonable share of the market, and in order to do so we would operate through these various forms of distribution to gain adequate representation.

Q. Other than that general statement, do you know of any specific reason why it was followed as a system in Spokane, for example? A. I don't know of any specific reason. When you specify one town, we engaged in various forms of distribution in order to be able to serve all various types of customers in all areas.

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[RONALD ALLEN HARDIN, R. 632]

* * *

Q. Mr. Hardin, could you tell the jury your present home address? A. Yes. My present address is North 4019 Hemlock.

Q. What is your occupation? A. Currently I am the director of sales for the Ridpath Hotel.

Q. Can you tell us what your occupations were, just briefly if you would, over the last period, say, 1971 to the present? A. Yes, I was in the broadcast business. I was the [Hardin, R. 633] news director for KSPO radio from 1971 to about 1974. Then I went for a short nine-month stint with KXLY radio in 1974, and then I went over to KGA, and I was the news director there from late 1974 through 1977. And then I went to KHQ radio where I became the sales manager of the radio station there.

Q. Can you tell us just generally the locations in Spokane of those occupations? A. Yes. KSPO at that time was located in the Columbia Building downtown and KXLY is at its current location, which is 500 West Boone Avenue in the area of the Coliseum. KHQ is located in the--I am sorry, KGA is located at 6200 South Freya, South Regal, and KHQ in the 4200 block of South Regal.

Q. Can you tell us about approximately how many miles you traveled each day to and from work, if you can recall? A. For the KGA and KHQ, the duration of my employment there was about eight to nine miles.

A. Those are on the south side?

Q. That's correct. It was less than that to KXLY, possibly half of that. Maybe about three or four miles when I was with KSPO.

Q. Were you served with a subpoena by me to be present today?

[Hardin, R. 634] A. Yes.

Q. Do you know Mr. Hank Rigg? A Yes, I do.

Q. Could you tell the members of jury how you know Mr. Rigg? A. Yes. In the early Seventies I visited Hank Rigg's station, and after going to the station a couple of times I got to know him very well because he was a very friendly individual. He serviced my car. He came up to the car and was very cordial, and over a period of a couple of times at his station we just became very good friends in a business relationship. He seemed to be a very honest individual and we just developed a friendly business relationship over the years.

Q. So, could you tell us approximately the years that you were trading with Mr. Rigg, if you know? A. Yes. It was

approximately in the time period of 1970 through 1980.

Q. Did you buy gas during that period of time from any other Texaco stations in Spokane? A. Yes, I did.

Q. Can you tell me which ones they are? A. Yes. I recall purchasing gasoline from a Texaco station directly at the base of the Monroe Street [Hardin, R. 635] hill, approximately Monroe and Alice, I believe. I also recall a time or two that I visited the station on Third Avenue, and also there was a station that was on Freya.

Q. So those were both Texaco stations as well? A. They were Texaco as well.

Q. Would you have occasion to trade with those stations to and from work? A. Yes. For the most part all of my trading was to and from work.

Q. Did you have a Texaco credit card during that time period? A. During

that time the only card that I had was a Texaco credit card.

Q. Can you give the jury an estimate approximately of how much of your gasoline business was using the Texaco credit card? In other words, did you purchase all your product on the card or did you pay cash? **A.** It certainly was over 90 percent of the time that I used the Texaco credit card.

Q. Was there a reason why you only had one credit card in Spokane at that time? **A.** Yes. I was--one of the reasons was Hank Rigg. He was an excellent person and a good operator, and I just--I was very happy with Texaco gasoline and the **[Hardin, R. 636]** service that I was receiving, so I really didn't see any need to have any other credit card at all.

Q. During those same years, 1971 '72 to the end of the Seventies, when you were

living on the north side of Spokane did it become apparent to you that the prices being posted at the three stations you identified, Monroe, Freya and Third Avenue were posting lower retail prices than Mr. Rigg? **A.** Yes, it did.

Q. If so, can you tell us approximately what the difference in the price was, and I am not going to hold you to the exact figure because I know we are talking about many years ago. **A.** It was between three and four cents less than the price at Hank Rigg's station.

Q. Now, I think you testified, and correct me if I am wrong, that you also traded with Mr. Rigg during those years, is that correct? **A.** That is correct.

Q. And up until the time that you began to notice this difference in the price, the three to four cents, did you purchase the majority of your gas from

Mr. Rigg? Can you give us any idea what your gas needs were that he filled? A. Yes. I purchased most of my gas with Hank [Hardin, R. 637] because I really found him to be a delightful person and I like to deal with people that I feel are honest, and he certainly fit that category.

Q. After you noticed this change in the buying price that you described, did that affect your buying habits? A. Yes, it did.

Q. Can you tell the jury what happened after that? A. Well, I noticed that periodically as I drove by on Monroe that the prices were lower at the station below the hill there at Monroe and Alice, three or four cents lower, and at that time I didn't have a whole lot of money to spend on gasoline, and so that was a significant amount lower than Hank's price, so I would say that

on the average once I noticed this of every four times that I bought gasoline, three of the four times I would purchase it at the station right below the hill on Monroe, and the fourth time, I am sure that I got extra service and I'm sure that Hank knew that I was still around, I was at Hank's station.

Q. Now, the station on North Monroe there, did you have to get out and pump your own gas at that station? A. One of the things about that station that intrigued me was that despite the fact the price was [Hardin, R. 638] three or four cents lower, the attendant also pumped the gasoline, so I really didn't even have to get out of the car.

Q. Do you recall if you had to get out of your car at the station on North Freya? A. I really can't remember.

Q. What about the one on Third Avenue? A. As I recall, that had an attendant as well.

Q. Did the fact that the station on North Monroe had a car wash, was that of any significance to you? A. I don't ever recall using the car wash.

Q. Can you tell us generally how often you would have observed the prices at those stations on North Monroe? A. I drove by there every day, and it was quite an obvious sign, so I noticed it at least every one or two days as I drove by there.

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[Hardin, R. 639]

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Q. What was the reason why you switched from Mr. Rigg? A. Price. I, as I said before, I didn't have a whole lot of money to spend on gasoline at that time, and a three to four cent savings at that

time--as I recall, the gasoline prices were lower, so a three to [Hardin, R. 640] four cent savings was quite a bit more significant at that time.

Q. Did you ever talk to Mr. Rigg during this same time period we have been referencing about his retail prices and what was happening? Just answer that yes or no. A. Yes.

Q. Then can you tell me where the conversations would take place and about what was said, if you know, by you? A. Yes. At that time I told Hank that I was really concerned about the fact that I had to trade at another station, because I had gotten to like Hank and he impressed me as a very honest business-man. And I told him that I had to trade at the other station because it was cheaper by three or four cents, and I asked him why that was the case. And he said--

* * *

A. And the--Hank said that the price was--that he offered was in response to the business costs that he had to operate on and his price could not be any lower.

* * *

[Hardin, R. 643]

* * *

Q. During the whole period of time we are talking about, roughly the decade of the Seventies, you were driving your own car that you had to buy the repairs for? A. That's correct.

* * *

Q. And you appreciated the fact that Hank Rigg's provided for you good reliable maintenance when you needed it? A. That's correct.

Q. You had him do that maintenance, I assume, Mr. Hardin? A. He did all the maintenance for my car except any maintenance that may have been required

under warranty which was done by a new car dealer.

[Hardin, R. 644] Q. I understand. With the exception of that you had him do things like what, change the oil and lube the car once in awhile? A. That's correct, change the tires, anything along that line.

Q. Changing the tires. If it needed new windshield wipers he would take care of that? A. He would do.

Q. I suppose he would replace the headlight if one was broken? A. That's correct.

Q. All those services. How about tune-ups, did he do those for you as well? A. He did all the service on the car other than the warranty work.

Q. He was really providing you something special, in that he was giving you reliable service that you could trust and was available when you knew

you needed it, isn't that correct?
A. That's correct.
Q. You couldn't buy that at the Monroe Street station, could you? A. The only thing that was available there was the attendant to pump gasoline.

* * *

[RUSSELL H. VICTOR, R. 685]

* * *

Q. Would you state your name, please.
A. Russell A. Victor.
Q. Where do you reside? A. Seattle.
Q. And what is your occupation?
A. Executive vice-president of Gull Industries.
Q. And how long have you held that position? A. Nine years.

* * *

What are your duties with Gull Oil Company as executive vice-president?
A. Responsibility for all the

operations of the company, finance, sales, trucking.
Q. And where does Gull Oil Company do business? A. We operate in Idaho, Washington, Oregon and Nevada.
[Victor, R. 686] Q. What is the primary business of Gull Oil?
A. Petroleum distribution.
Q. When you say petroleum distribution, in all those states does Gull Oil Company operate retail service stations? A. That is correct.
Q. With respect to Eastern Washington, what business does Gull Oil Company conduct in Eastern Washington? A. We have service stations which we own and lease, and we also wholesale some products.
Q. When you say products, this being gasoline motor fuels? A. Gasoline motor fuels, that is correct.

Q. In Spokane, Washington, Spokane County, Washington, does Gull Oil Company operate retail service stations? **A.** We lease them, service stations to operators.

Q. Does Gull Oil Company own service stations in Spokane, Washington? A. That is correct.

Q. Is the gasoline product that is owned by Gull Oil Company sold through those stations? **A.** That is correct.

Q. With respect to those stations, who owns the product that is sold through the station? **[Victor, R. 687]** **A.** Owned where? Do you mean in the ground or in the tanks or what?

Q. In the ground. * * * **A.** On commission stations we own the product in the ground, and on consignment we own the product in the ground.

Q. So that with respect to the product in Spokane that is sold to stations that

Gull Oil Company owns, Gull Oil Company owns the product in the ground? **A.** That is correct.

Q. Who sets the retail price at which the gas is sold at those stations in Spokane? **A.** On commission accounts we do. On consignment, the operator does.

Q. At the present time do you have any consignment accounts in Spokane? **A.** No.

MR. EBEL: I should note for the record that the deposition was taken on October 12, 1978.

Q. So with respect to the stations Gull owns in Spokane, Gull sets the price at which the product is sold? **A.** Correct.

Q. Where does Gull pick up the product that it sells in Spokane? **[Victor, R. 688]** **A.** At, I think it is, the Texaco terminal.

Q. And from whom does Gull purchase the product that it sells in Spokane? **A.** Texaco, Incorporated.

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[Victor, R. 689]

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Q. (BY MR. EBEL) From 1970 to the present, could you describe for me the type of arrangements that Gull had with its retail stations in Spokane? A. From 1970 to the present?

Q. Yes, sir. A. Around 1970 most of our stations were all on a consignment basis where we would own the product in the ground, and when the dealer pumps the product out he assumes title to the product. Then when we went to self-serve, we remodeled these stations and put them on commission basis. On commission basis we own the product through the pump and we give the dealer a [Victor, R. 690] commission on how many gallons are pumped.

Q. On the consignment stations that you had, did you own the property where the

station was located? A. In some cases. In some cases we had leases.

Q. The lease would be from-- A. From the property owner to us.

Q. You would control basically retail facilities at the station? A. That's correct.

Q. And then you would sell the product to a dealer? A. As it passes through the pump.

Q. And you would retain title to the product while it was stored? A. That is correct.

Q. But as it was sold to the motoring public, title would pass to the dealer and then to the purchaser of the motoring public? A. That is correct.

* * *

[Victor, R. 691]

* * *

Mr. Victor, you have prepared a list, I believe, of your stations that

were operated in Spokane from 1970 to the present which includes volumes and dates the stations were operated.
A. Yes.

Q. And the basis upon which they were operated, is that correct? A. Yes.

Q. Could you make a copy of that for the use of Texaco counsel, and we will mark that as an exhibit? A. Yes.

Q. * * * I would hand you what has been marked Exhibit 385 and ask you if that is a true copy of a schedule which you prepared of stations that were supplied or operated by Gull Oil Company in Spokane from 1970 to the present.
A. That is correct.

MR. EBEL: Your Honor. We offer Exhibit 385.

MR. ROBINSON: Your Honor, subject to certification we have no problem.

THE COURT: 385 admitted.

[Victor, R. 692]

* * *

Q. (BY MR. EBEL) During the period from 1970 to the present, were there stations which you supplied in Spokane but which were not under any contractual relationship with Gull? A. I think they are listed on this sheet.

Q. There were stations you supplied product to but did not-- A. Have any lease or ownership of, that is correct.

Q. Of the station? A. Yes.

Q. And what stations were those as described on Exhibit 385? A. Number one, number two, number three, number four. Just those four.

Q. * * * How many personnel have you had employed in Spokane by Gull Oil Company from 1970 to the present?
A. Two to three.

Q. At the present time do you have three people employed there? A. Yes.

Let me clarify that. We have one full-time truck driver and a half-time truck driver.

Q. And do those truck drivers perform any duties [Victor, R. 693] besides driving trucks for you? A. The truck driver schedules the deliveries.

Q. Does he have any functions for Gull other than delivery of product and the scheduling of deliveries? A. No.

Q. Would that be true with respect to both truck drivers? A. That is correct.

Q. And what is the other employee Gull Oil Company has in Spokane? A. Mr. Tortorelli.

Q. What is his job? A. Area supervisor. He calls on service stations and makes price surveys and sees the stations are operating properly and arranges for new dealers.

Q. Other than the two truck drivers who haul product for Gull, the only

supervisory person in Spokane employed by Gull would be Mr. Tortorelli? A. That is correct.

* * *

[Victor, R. 698]

* * *

Q. Did you have a price which you would call a commission price to those stations which operated on commissions? A. There would be no commission price. We owned the product, we never sell that product to the dealer.

Q. The price that would exist with respect to commission stations would be the price at which it was sold to the motoring public? A. That is correct.

Q. And that would be the retail price? A. That is correct.

* * *

[Victor, R. 702]

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Q. Did Gull, in Spokane between the period 1970 to the present, ever employ the use of price zones? A. Yes.

Q. And what was a price zone? A. It was a zone that we felt that our station was situated in, it would encompass our competition and we would price in that zone area off our competition.

Q. Were those zones the same as the zones that were designated by Texaco? A. No.

Q. Were you aware that Texaco had zones in which they included Gull stations? [Victor, R. 703] A. Yes.

Q. Were your zones larger or smaller than the zones that were created by Texaco? A. I believe ours were larger.

Q. They would cover a larger geographic area? A. I believe so.

Q. Why did you not use the Texaco price zones? A. In some instances they didn't fit our needs to be competitive with our competition.

Q. You thought your competition was that larger area than the area defined by the Texaco price zone? A. That is correct.

Q. Do you have price zones in existence in Spokane at the present time? A. No.

Q. In your observations of the Spokane market with respect to pricing, did the price in Spokane generally seem to move as a city as a whole as opposed to small price zones? A. I think you could say that, as I recall, correct.

Q. Do you have any observations as to why Spokane pricing operates that way? A. I believe Spokane is not a big community and people can get across town fairly easily in Spokane where they couldn't in Seattle, for instance. They

[Victor, R. 704] are more mobile over there than we are here.

Q. They are more mobile in Spokane?

A. Yes.

Q. In determining your price that you would set at a commission station, was there any price differential that you tried to maintain between your price and the prices posted at major brand stations? A. We tried to maintain a penny below the major brands.

Q. Were there any major brand marketers in Spokane who attempted to price in the same manner you did during the period 1970 to the present? A. I wouldn't say attempted to price the same as we did. You might say there are more aggressive pricers in the major field.

Q. Was there any particular distributor of product in Spokane that you felt was an aggressive marketer? A. I think there was two aggressive ones. One was

the Exxon jobber and one was a Texaco jobber.

Q. Who was the Texaco jobber?

A. Dompier.

Q. You considered John Dompier an aggressive pricer in the Spokane market. A. Correct. * * *

[Victor, R. 705]

* * *

Q. What do you mean by an aggressive pricer? A. I think they try to price their station below their competition in their immediate surroundings of that unit.

Q. Would an aggressive pricer generally price below the prevailing major price in the area in which the two compete? A. That is what I call an aggressive pricer, correct.

Q. What in your opinion would happen to the volume of sales of your product if you were to price at the same level as

the price of a major competition in the area in which you compete? A. I think that we would probably lose half our volume.

MR. EBEL: Counsel for Texaco--counsel for Gull then asked why.

A. The customer would have no incentive to come to our unit over major units, no credit cards, no national brand, no advertising, no service. They have to pump their own product. Unless we have that price advantage, people won't come into our units.

Q. You figure the number one reason people come to your stations is price? A. Definitely.

[Victor, R. 706]

* * *

Q. And the outlets that you had in Spokane under the Gull brand, did they sell Texaco brand motor oils? A. Yes, I am sure they did.

Q. At your commission stations that are operated in Spokane, would the retail sale price of the product be determined by Gull personnel in Seattle? A. That is correct.

Q. Any change in the price would have to be approved by Seattle before it could be changed in Spokane? A. That is correct.

* * *

[CLIFFORD N. ROBINSON, R. 746]

* * *

Q. Let's talk about with gallons, losing back room business. Is it true, sir, that the Dompier stations that you were concerned with, the ones that were supplied by John Dompier Oil Company, did not have any back room services? A. None.

Q. Am I correct in that, sir? A. What?

Q. Am I correct when I say? A. You are.

Q. Okay. And is it true that for the most part you were able to retain the back room business that you had through the years? **A.** Yes.

Q. Now, near your station was there also a Standard station on Wellesley and Market? **A.** Yes, there was, just one block south.

Q. And was that a competitor of yours? **A.** Sure.

[Robinson, R. 747] Q. And that station was much closer than any Dompier station, correct? **A.** Yes.

Q. And also at Wellesley and Market there was an American station? **A.** Yes.

Q. And would that station--was that station also a competitor of yours? **A.** Yes.

Q. And that station was closer to you than any Dompier station? **A.** Yes, it was.

Q. And then on the intersection of Wabash and Market was there a Shell station? **A.** Yes.

Q. And was that station closer to you than any Dompier station? **A.** Yes, it was.

Q. On Rowan and Martin was there a Big Red's self-serve unit? **A.** Yes, there was.

Q. Was that station closer to you than any Dompier station? **A.** Yes.

Q. And was that Big Red station during the time **[Robinson, R. 748]** that you were a Texaco dealer remodeled and turned into a tire store and semi self-serve? **A.** Yes.

* * *

[Robinson, R. 750]

* * *

Q. (BY MR. ROBINSON) Now, on Gordon and Market was there a Vista station? **A.** Yes.

Q. And was that station closer to you than any Dompier station? A. Yes, it was.

Q. And just one block from that, was there a Jackpot station? A. Yes, sir.

Q. And was that station likewise closer to you than any Dompier station? A. Right.

Q. On the southeast corner of Euclid and Market was there a private brand, and I will spell this for the reporter, A M O C O R I L L O? A. Yes, there was.

Q. And was that station closer than any Dompier station? A. (Witness nods head affirmatively.)

Q. Do you recall where the Hillyard Safeway store **[Robinson, R. 751]** was? A. Yes.

Q. And on the edge of that parking lot, was there a station that used to be known as the Headlight Oil Company? A. Yes.

Q. And was that station closer to you than any Dompier station? A. Yes, it was.

Q. Do you recall that there was some 12 full service stations in the Hillyard area at one time? A. Right.

Q. And did you regard those 12 full service stations as your primary competition? A. They were all competition, yes.

* * *

[JOHN NEIL DOMPIER, R. 755]

* * *

Q. Mr. Dompier, are you the same John Neil Dompier that is the president of Dompier Oil Company? A. Yes.

Q. Were you subpoenaed by me to be here today? A. Yes.

Q. How long have you been president of Dompier Oil Company? A. Since 1973.

Q. And prior to that time who was president of Dompier Oil Company? A. My father, John K. Dompier.

* * *

[Dompier, R. 756]

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Q. (BY MR. WHALEY) Mr. Dompier, would you give the jury, while we are getting these exhibits, the background of Dompier Oil Company and its becoming a distributor of Texaco products? A. All right. John Dompier Oil Company was formed by my father in 1954. At that time we sold only Quaker State motor oil. Shortly after that we got involved in the heating oil business, and to the best of my recollection we became involved with Texaco as a distributor for their motor oil about 1956 or '57.

In about 1960 we became what Texaco referred to as a full line distributor, meaning that we were distributing not

only their motor oil but their heating oil, diesel fuel and gasoline as well. Approximately the middle part of the Sixties, in the Sixties we began selling some gasoline, and toward the latter part of the Sixties our gasoline business began increasing to where probably in the early Seventies, it became the most important part of our business.

[Dompier, R. 757] Q. By the middle Seventies what percentage of your business was selling gasoline as opposed to other products? A. Well, this would just be a guess but middle 1970's?

Q. Yes, sir. A. 75, 80 percent.

Q. And of that 75 to 80 percent was that gasoline being sold at retail? A. Not all of it.

Q. What percentage of your gasoline sales would have been at retail? A. Probably 84 to 90 percent.

Q. Of your gasoline sales? A. Of gasoline sales, (nods head affirmatively).

Q. Would it be fair to say that the emphasis of your business changed substantially from the early Sixties until the Seventies? A. Yes.

Q. Did you have any conversations with Texaco during this period of time encouraging you to--Dompier Oil Company to change its emphasis and to move into the retail business? A. Yes, we did.

Q. Would you tell the jury about that?

[Dompier, R. 758] Q. Well, at various times Texaco encouraged us to begin supplying retail service stations. In the early Seventies they did that, and then as time went on, they encouraged us to own the stations that we were supplying; in other words, to try to control our own retail business. And beginning about 1974--we did purchase a

station in '74 and some more in '75 and we began operating those as company operations with salaried company employees.

Q. Would you point out to the jury the stations you began to supply in the early 1970's and tell them the address? There is a map right next to you. A. We began to supply, not necessarily--

Q. Yes, beginning with the ones you supplied. A. We supplied a station at North 303 Third Avenue.

Q. Can you point that out to the jury on the map?

THE COURT: Just a moment. There isn't any North 303 Third, did you misspeak yourself?

THE WITNESS: Yes, East 303 Third. Excuse me.

THE COURT: All right.

A. That would be about in this area. And then we supplied a station at

North 3306 Monroe, right here. One at North 502 Freya that was located right here. That would be up to 1975. We also supplied for a **[Dompier, R. 759]** short time a station on North Division, nine--I believe it was 920 North Division, and that would be about here. We supplied one at Division and Cleveland. That would be about the 3000 block of North Division, right about here. We had one on North Division north of Francis Avenue shown right here. One on Market Street, 2924 North Market, right here. We supplied one on Mission Avenue. I believe the address is 1831 Mission, here, (indicating). One out in the Valley on Sprague Avenue about the 6700 block on East Sprague, and then here is one out in the Airway Heights area.

Q. (BY MR. WHALEY) Thank you. You can return to your seat.

Do you recall beginning to supply gasoline to stations which were named Red Carpet? **A.** Yes.

Q. And who were the original owners of Red Carpet? **A.** My father, John K. Dompier, and a man by the name of Robert Harder.

Q. And when, to your recollection, was Red Carpet formed and you began to supply gasoline to them? **A.** Red Carpet was formed, I think, in the spring of '68. We began supplying gasoline when the first station was completed in the fall of '68.

[Dompier, R. 760] **Q.** And would you tell the jury where the Red Carpet stations were located? **A.** The first one was located at Division and Cleveland, and that would be approximately the 3000 block on North Division right at the bottom of the hill. And we supplied that one only from the fall of

'68 until about the first of 1970 when we began supplying the second Red Carpet service, which was located on East Sprague around the 6700 or 7000 block, something like that.

Q. Do you recall when Mr. Harder was bought out of the business by your father? A. In the fall of '69.

Q. So from '69 on, the Red Carpet was owned by your father? A. That's right.

Q. And who was the sole owner of the John Dompier Oil Company at that time? A. My father.

Q. So he was the president of Red Carpet as well as the president of John Dompier-- A. That's right.

Q. --Oil Company? Where were the corporate offices of John Dompier Oil Company at the time you were supplying Red Carpet? [Dompier, R. 761] A. At that time North 407 Madelia.

Q. Where were the corporate offices of Red Carpet? A. I don't know, I think probably the same address.

Q. Did you send mail and--

MR. ROBINSON: Excuse me, Your Honor, I would move to strike the answer as being speculative.

THE COURT: Overruled.

Q. (BY MR. WHALEY) Did you send invoices to Red Carpet? A. Yes.

Q. And where would you invoice Red Carpet? A. North 407 Madelia.

Q. That is the same corporate offices address as your company? A. That's right.

Q. And was any other company in that building besides you at that time? A. No.

Q. So, the bills to Red Carpet went to your same address? A. That's right.

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[Dompier, R. 770]

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Q. (BY MR. WHALEY) So there is not any confusion, my--I don't want the--his copy appears to be different than mine with the page for delivery farther back so I don't want to--they are not both exactly the same, but what is the point of delivery on your contract? **A.** FOB distributor's bulk plant, Spokane, Washington.

Q. Where was your distributor's bulk plant? **A.** North 407 Madelia.

Q. How much storage capacity for gasoline motor oils, regular and Sky Chief did you have at that bulk plant? **A.** We had a total of 16,000 gallons.

Q. And you had--would you break that down for the jury? **[Dompier, R. 771]** **A.** We had 10,000 gallons of storage for Fire Chief or regular gasoline and 6,000 gallons for Sky Chief.

Q. At the time in 1973 you were purchasing many millions of gallons of gas, is that correct? **A.** Yes, we were purchasing approximately five to six million gallons at that time.

Q. And when you purchased that gasoline, you wouldn't run it from the Exxon pipeline to your bulk plant, would you, and unload it and then take it to your gas stations? **A.** No.

Q. I mean, 16,000 gallons of storage is less storage than you had at a lot of your gas stations, is that correct? **A.** That's correct.

Q. So in the delivery of your gasoline to the stations that you operated or supplied, your bulk plant was not the point at which you distributed the product, is that correct? **A.** That's correct.

Q. I am looking at Exhibit 72. I'd like you to look at paragraph two of

that letter. And would you read to the jury the provision of the agreement as to where the product is to be taken under paragraph two?

[Dompier, R. 772] A. It says, "Each time such product is do delivered to your transport trucks, you should advise us of the actual bulk station point of distribution specified in said distributor agreement to which said product is to be transported by you."

Q. And that bulk plant would have been your own bulk plant, is that correct? A. Correct.

Q. And then under paragraph four, what does it say, how the product is to be distributed? A. "Said product shall be transported by you to such point of your own account, in equipment owned by you at your sole cost and expense and at your sole risk. Title to said property

shall pass to you upon lifting by your transport truck."

Q. Now, under your--the way you operated, instead of taking the product to your distribution point you take it directly to the stations that you operated or supplied? A. Mostly, yes.

Q. And what would be a circumstance where you would use your 16,000 gallons of storage at the bulk plant to supply one of these stations that you operated or supplied? A. Oh, if one of the stations ran out of a [Dompier, R. 773] particular grade of gasoline and were not able to hold a whole load, we would supply it with a small truck from our bulk plant. And there might have been other--a few other times when it was just more convenient for us to do it that way.

Q. But that would be a rare occasion, is that correct? A. Yes.

Q. Now, pursuant to this agreement in May 23 of 1973, under paragraph three, did Texaco pay you for picking up the product and hauling it? **A.** Yes, it did.

Q. And what did they pay? **A.** To the best of my memory, they paid us a figure that was equal to what was referred to as the cross town common carrier rate.

Q. That would have been a rate--that if you had hired a common carrier to haul the product for you, you would have paid them to haul it? **A.** That's right.

Q. And do you understand--to your understanding does that common carrier rate have a built-in-profit? **A.** I am sure that it does.

Q. Did you find it to be an advantage to you to be hauling your own product? **[Dompier, R. 774] A.** Yes.

Q. The Mr. Harder that your father formed Red Carpet with in 1960, is that the same Mr. Harder that you later

supplied gasoline to at another station? **A.** Yes.

Q. In what station was that that he had an interest in? **A.** He had the station on Market Street. I believe the address was 2924 North Market Street, and then a few years later he acquired the station at 1831 East Mission.

Q. Would you hand the witness Exhibit 748 and 749?

Would you identify Exhibit 748 and 749?

A. 748 is a picture of the Red Carpet service station on Division and Cleveland.

Q. And what is 749? **A.** 749 is a picture of the Red Carpet service station out on East Sprague.

Q. And were those both flying the Texaco sign, those stations, when you supplied them? **A.** Yes.

Q. And did they take the Texaco credit card? **A.** Yes.

Q. Under your hauling allowance, the common carrier **[Dompier, R. 775]** rate, was that payment sufficient to cover the cost of transporting the gasoline? A. Well, we never kept track of it in that manner, but I am sure that it was.

Q. If it hadn't been, you would have told Texaco to haul it, is that correct? **A.** That is probably right.

Q. Mr. Dompier, would you file excise tax returns during the period of the Seventies? **A.** Yes.

Q. And did you file excise tax returns that reflected your gasoline sales at retail? **A.** Yes.

Q. With respect to the salary operation stations that you operated, did you file those forms indicating that you were operating a part of your business at retail? **A.** Yes.

Q. And did you show to the excise tax people the part of your business that was wholesale and the part of the business that was retail? **A.** That's correct.

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[Dompier, R. 777]

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Q. (BY MR. WHALEY) And in November of 1975 would you tell us what stations that Dompier Oil Company was operating itself at retail? **A.** 303 East Third Avenue, 4406 North Monroe, and 502 North Freya.

Q. When you filed these tax returns and you put a portion on there that you referred to retailing, did you consider that portion of your business to be selling gasoline at retail? **A.** I am not sure whether retailing in this form may not have also included heating oil.

[Dompier, R. 778] **Q.** Did you consider that the gasoline sales you were making that you included on the form to be sales at retail? **A.** Yes, I did.

Q. And that is the same kind of form that any other gasoline dealer would fill out to show retail sales? **A.** As far as I know.

Q. Including the plaintiffs in this case? **A.** Yes, I believe so.

MR. WHALEY: Would you hand Exhibit 785 to the witness?

THE COURT: I am sorry, what was the number?

MR. WHALEY: 785.

Q. (BY MR. WHALEY) Can you identified Exhibit 785, Mr. Dompier? **A.** Yes, they are pictures of our transport truck.

Q. And where were the pictures taken, can you tell? **A.** Looks like they were

taken at the Exxon terminal here in Spokane.

Q. And what was the capacity of those trucks? **A.** 9,400 gallons.

Q. So your truck had 9,400 gallons and your storage at your plant had 1,600? **A.** 16,000.

Q. 16,000, excuse me. [Dompier, R. 779] **A.** That's correct.

Q. How much storage did you have at the Freya Street station? **A.** I believe we had a total of 44,000 gallons.

Q. So that would have been substantially more than your bulk plant? **A.** That's right.

Q. And how much storage did you have at your Monroe Street station? **A.** 20,000.

Q. And that is more than you had at your bulk plant? **A.** Right.

Q. And how much storage did you have at Third Avenue? **A.** I believe it was 13,000.

Q. That is a little less than you had at your bulk plant? **A.** That's right.

Q. Did you have any unlidded storage at your bulk plant. **A.** No.

Q. And Market Street, did you start salary operating the Market Street station as well? **A.** Not until about 1979, I believe, on Market Street.

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[Dompier, R. 787]

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Q. (BY MR. WHALEY) What is a salary operated station in your understanding? **A.** We refer to a salary operated station as one that we, John Dompier Oil Company, operates with company salary paid employees?

[Dompier, R. 788] Q. All right. What stations during the period from 1972 to 1981 did you salary operate? **A.** 303 East Third Avenue.

MR. ROBINSON: Your Honor, just for point of clarity, I think we need the starting date rather than just broadly covering all of them.

MR. WHALEY: I will get to the specifics of each station.

THE COURT: All right. With that understanding, go ahead, Mr. Dompier.

A. You want just a list of the stations?

Q. (BY MR. WHALEY) Yes, sir, salary operated. **A.** 303 East Third Avenue, 4406 North Monroe, 502 North Freya, 2924 North Market, 1831 East Mission. For a very short while the station at Airway Heights--and for a period of about two months the station on Driscoll Boulevard and C.

Q. The one at Driscoll Boulevard and C has been the station that had formerly been operated by Ricky Hasbrouck? **A.** Yes.

Q. In a salary operated station, you would buy the gasoline from Texaco and then resell it to the motoring public? A. Yes.

[Dompier, R. 789] Q. The same as a dealer in this case, would you buy it from Texaco and resell it through your station? A. Yes.

* * *

Q. When you bought the--when you salary operated the station you would buy the gasoline from Texaco, is that correct? A. That's correct.

Q. And then you would resell the gasoline through your station to the motoring public? A. That's correct.

Q. Just like the plaintiffs in this case buy their gas from Texaco and resell it to the motoring public? A. That's correct.

[Dompier, R. 790] Q. Is there anything--any sales transaction that you

have between John Dompier Oil Company and your station when you are salary operating it? A. For a period of time we had a sales transaction, we actually wrote an invoice and charged a price to the station, but that was for just a short period of time. After that it was strictly a bookkeeping transfer.

Q. And the station, the company that was operating the station was the John Dompier Oil Company? A. That's right.

Q. And the company that was buying the gasoline was John Dompier Oil Company? A. That's right.

Q. During the early 1970's up until late '72, early '73, did the stations that you supplied receive price assistance from you? A. Yes.

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[Dompier, R. 793]

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Q. (BY MR. WHALEY) Mr. Dompier, would you tell the [Dompier, R. 794] jury what retail tank wagon is? [A.] Retail tank wagon is a price at which Texaco sells a retailer.

Q. Retail tank wagon was a price that you would look to to see what you would buy gasoline for, is that correct? A. We bought it at a discount below that price.

Q. So, for you to figure out your price of gasoline when Texaco told you retail tank wagon price changed, how would you figure out where your price was? A. We would deduct our margin or our discount below retail tank wagon.

Q. So the pretrial order indicates that during the period of 1970 to about May of May 22, 1973 you were buying gas for 3.95 cents less a gallon than retail

tank wagon. Does that jibe with your memory? A. Would you give me those dates again, please?

Q. They have been agreed to here. Did you buy gasoline in the early Seventies for .0500 less than--four cents a gallon less than retail tank wagon? A. Yes, we did.

Q. To make that clear, when plaintiff was buying retail tank wagon during that period of time, you would be paying close to four cents less than retail tank wagon?

[Dompier, R. 795] A. That's correct.

Q. Then when you were salary operating stations in '75 you would buy gasoline for what price? A. For .0395, I believe, less than Texaco's retailer tank wagon price.

Q. So when you were figuring your margin to post at retail at, say, your Third Avenue station in 1975, your

purchase price would be how much less than retail tank wagon? **A.** 3.95 cents per gallon.

Q. So if you posted a retail price that was equivalent to retail tank wagon, how much would your margin be?

MR. ROBINSON: Object, Your Honor, calls for speculation and not proven by the fact.

THE COURT: Overruled.

A. 3.95 cents.

Q. (BY MR. WHALEY) So you make close to four cents a gallon if you posted at retail tank wagon? **A.** That's correct.

Q. And if a retailer was buying gasoline and posted a price at retail tank wagon how much margin would he have? **A.** Nothing.

Q. He would be selling it for his cost? **[Dompier, R. 796]** **A.** That's correct.

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[Dompier, R. 797]

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Q. (BY MR. WHALEY) Now, during the early 1970's you, or John Dompier Oil Company sold gasoline to Red Carpet, is that correct? **A.** That's correct.

Q. And that was a company that was wholly-owned by your father? **A.** Yes.

Q. And wholly-owned by--John Dompier Oil Company was wholly-owned by your father? **A.** Yes.

Q. And during that period of time would you tell the jury what price assistance was? **A.** During that period of time Texaco had a number of pricing areas in Spokane, and when by their determination, the retail price got to a certain level, then they would pass on price assistance to **[Dompier, R. 798]** both ourselves and their retailers of a certain amount per gallon.

MR. WHALEY: Can you move Exhibit 791 down so we can look at the other map, Mr. Bailiff.

Q. Mr. Dompier, look at that map and see if you can locate what has been identified previously as a map of Texaco price zones? Would you look and see if you can locate the location of the Red Carpet station on North Division? **A.** I believe this would be it right here.

Q. And do you know how close that station is to a station that was operated by Mr. Hardwick? **A.** About two blocks.

Q. And from that map was that in the same price zone as the Red Carpet station? **A.** Yes.

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[Dompier, R. 799] Q. (BY MR. WHALEY) During the early Seventies was there a substantial competition in the gasoline market? **A.** Yes.

Q. And did Texaco assist dealers in competing, when the price got close to their margins, extend additional price allowances to help dealers compete? **A.** That's correct.

Q. And in like manner stations that were supplied by the John Dompier Oil Company, if they were in a price zone where the retail prices were getting low, close to the margin--the purchase price of the dealer, did they too apply through you for price assistance? **A.** I don't think that is a correct statement. I don't think they would apply through us for price assistance, but Texaco would give us, to the best of my knowledge, the same price assistance that they gave the retailer.

Q. Then would you pass that on to your dealer? **A.** That's correct.

Q. So, for instance, if Texaco were giving price assistance in Harold

Hardwick's price zone, the Red Carpet station would receive an additional allowance if price assistance was being given in that zone? [Dompier, R. 800]

A. That's right.

Q. And Mr. Hardwick would get an additional allowance? A. That's right.

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[Dompier, R. 802]

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Q. (BY MR. WHALEY) Exhibit 133 would be a record of the number of gallons pumped at stations that the John Dompier Oil Company supplied during the period reflected on the exhibit? A. Yes.

Q. So looking at Exhibit 133, which is dated April 7, 1971 it will show the dates that price assistance would be given, for instance, Red Carpet car wash No. 1, the number of gallons that price assistance would be given and the amount of the price assistance? A. Yes.

Q. Going over from the left-hand side to the right, the first entry is Red Carpet car wash No. 1? A. That's right.

Q. And that's the station where, on Division? A. Division and Cleveland.

Q. That is the one that is in Mr. Hardwick's price zone?

[Dompier, R. 803] A. Yes.

Q. And this form will be presented to Texaco by you? A. Yes.

Q. And it would be to get additional discounts or rebates to, for instance, Red Carpet No. 1 to assist them in competing in that price zone? A. Yes. This form was submitted, however, after Texaco had told us that they were supporting a certain price. This was submitted to show them how many gallons we sold at that price.

Q. So that they would look at the price zone and see if the prices were down in

that zone and verify that, is that correct? **A.** Yes.

Q. And they would advise you that they would give so much assistance in that price zone? **A.** Yes, but before this was filled out.

Q. Right. **A.** Okay.

Q. So then you would check the meter readings and receive money from Texaco to assist the dealer in competing in his price zone? **A.** Yes.

Q. And that would be money that you would pass on to the dealer? **[Dompier, R. 804]** **A.** Yes.

Q. And that would result in a lower purchase price by the amount of the price assistance, is that correct? **A.** That's correct.

Q. And that also was done by Texaco for its own independent dealers, is that correct? **A.** Yes.

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Q. (BY MR. WHALEY) Do you know one way or the other, Mr. Dompier, how much assistance Texaco was giving its other dealers? **A.** No, I don't, but my recollection is that we were not getting as much as the retailer.

Q. But do you know what they were getting? **A.** No, I don't.

Q. Now, the Red Carpet No. 1 station here would be getting the price assistance at the same time that **[Dompier, R. 805]** it was competing with Mr. Hardwick's station, is that correct? **A.** That's right.

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[Dompier, R. 806]

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Q. So during the early '70's Texaco was giving you for these dealers an additional discount to help them meet competition in that same price zone? **A.** That's right.

Q. And then the station on Monroe Street would be in the same price zone as Mr. Rigg, is that correct? A. That's correct.

Q. Now, turning to page two of this document, this is a form that is filled out specifically. Will you tell us what page two is? A. (No response.)

Q. Will you tell us what page two of Exhibit 135 is--133? A. Page two appears to be the meter readings for a particular period. This one is dated the 27th of March, 1971, and it's the beginning and ending meter readings so we could determine the number of gallons [Dompier, R. 807] that were sold during that time.

Q. And for that station--what station is the name of the dealer for the second page, which I believe the date is March 29th. A. March 29th? Red Carpet car wash No. 1.

Q. That was a corporation that was wholly-owned by your father? A. Yes.

Q. And at that time your father owned John Dompier Oil Company, too? A. Yes.

Q. Was it incorporated then in '71? A. My recollection is that the oil company was incorporated in October of '71. This is March of '71.

Q. So at this time he owns John Dompier Oil Company individually and he owns the stock in Red Carpet? A. Yes.

Q. Now, at the bottom, the form is supposed to be signed by the dealer and then by the distributor, is that correct? A. That's correct.

Q. And who from your recognition of the signature signed as the dealer? A. They are the initials of my father.

Q. And then who signed as the distributor? [Dompier, R. 808] A. My father.

Q. So your father was signing as a dealer and also signing as the distributor? A. That's correct.

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Q. (BY MR. WHALEY) During 1971, '72, were you giving your--any of your dealers that you supplied gasoline a lower price than retail tank wagon? A. Yes, we were.

Q. Getting back to my chart of retail tank wagon for a moment--can I look at that a moment? To your recollection in 1971, '72, can you tell me what discount you were giving below retail tank wagon to the dealers you supplied? A. It varied during that time, but I was between two and three cents.

Q. Would that mean that that dealer would buy gasoline from you at a price two to three cents **[Dompier, R. 809]** below retail tank wagon? A. That's correct.

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Q. (BY MR. WHALEY) Let me repeat the question. During the period 1971 to 1972, the dealers that you were supplying were purchasing gasoline from you at a price two to three cents below retail tank wagon, is that correct? A. That's correct.

Q. And retail tank wagon you are referring to is the same as Texaco's retail tank wagon? A. Retail tank wagon I referred to as John Dompier Oil Company's retail tank wagon, however, are it was the same as Texaco's.

[Dompier, R. 810] Q. So they were getting the gas two to three cents less than the Texaco dealers during '71 and '72? A. That's correct.

Q. So when they posted their margin on the street, they would begin from their purchase price below retail tank wagon, is that correct?

THE COURT: You said posted their margin on the street.

Q. (BY MR. WHALEY) That wasn't very clear. A dealer that you supplied in 1971, if he posted his street price as retail tank wagon, would have a margin of two to three cents, is that right?

A. That's right.

Q. Whereas a plaintiff, if he posted retail tank wagon would have no margin, is that correct? **A.** That's correct.

Q. Now, during the period of time that Red Carpet was receiving gasoline from your father's company in the early Seventies, was it getting a discount off of retail tank wagon? **A.** Yes.

Q. So when the price assistance forms were filled out, the Red Carpet station was buying gasoline at a discount off of retail tank wagon from you, is that correct? **[Dompier, R. 811]** **A.** That's correct.

Q. And then in addition they were getting price assistance from Texaco through you to help compete in the same price zone? A. That's correct.

Q. And the same would be true with the Third Avenue station, it was buying gasoline below retail tank wagon in 1971, '72? A. Yes.

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[Dompier, R. 818]

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Q. (BY MR. WHALEY) Mr. Dompier, did you at some point in time begin to raise the price that you were selling gas to the stations at East 303 Third, Monroe and Alice, and on Freya? A. Yes.

Q. And at some point did you begin to sell gas to those stations at a price in excess of retail tank wagon? A. Yes.

Q. And when did you raise the price to those stations to where they were paying more than retail tank wagon, your best

recollection? **A.** To my best recollection, would have been shortly after the Arab embargo began, when the Department of Energy, or at that time the Federal Energy [Dompier, R. 819] Administration began controlling our prices. Gasoline was in very tight supply, and the Federal Energy Administration allowed us to--allow jobbers to increase their prices to their retail customers by a certain amount. I think it was a penny, but I am not sure about that at all. And when they allowed us to do that, we passed that on, and at that time, to the best of my knowledge, raised our retail tank wagon higher than Texaco's.

Q. Would it have been around April of 1974? **A.** Yes, that is probably about right.

Q. And after you had raised the price of gasoline to these stations in excess of retail tank wagon, did you purchase

any of the stations? **A.** In July of 1974 we purchased the station at 303 East Third Avenue from a man by the name of Larry Guessner (phonetic). And in July of 1975 my father purchased two stations that Mr. Koziuk had listed with a real estate company, the one at North 4406 Monroe and the one at 502 North Freya.

Q. At the time that Mr. Dompier purchased those stations at East 303 Third and on Freya--excuse me, on Monroe and on Freya, those stations then became salary operated stations by the John Dompier Oil Company? **[Dompier, R. 820]**

A. That's right.

Q. So when they became salary operated, the John Dompier Oil Company was able to use for its margin the full 3.95 cents discount off of retail tank wagon, is that correct?

* * *

A. Yes, that's right.

Q. (BY MR. WHALEY) And prior to your buying the station, the dealer was buying the product for retail tank wagon or above, is that correct? A. That's right. To the best of my knowledge, that's right.

Q. You purchased the Third Avenue station when? A. July of 1974.

[Dompier, R. 821] Q. And when you purchased it in July of 1974 did you own it yourself? A. Yes.

Q. And then whom did you lease it to? A. John Dompier Oil Company.

Q. So the John Dompier Oil Company was paying you rent for leasing that station? A. That's correct.

Q. When you began to operate that station in July of 1974, did the company change the operation at all? A. The only change we made was that we operated it with salary people.

Q. And did you use the same employees that had been there before? A. Yes, I think we did.

Q. And the only difference was you owned the station instead of a dealer, is that correct? A. That's correct.

Q. And you purchased the gasoline at discount off the retail tank wagon and he didn't? A. That's right.

Q. On the Third Avenue station who pumped the gas for the public? A. The attendant.

Q. Was it served by an attendant? [Dompier, R. 822] A. Yes.

Q. And if requested, would that attendant wash a windshield? A. I hope so.

Q. And if requested would they check under the hood? A. Yes.

Q. And did you sell oil? A. Yes.

Q. What sort of inventory did you have to keep for that station other than

gasoline? **A.** We kept a motor oil inventory, in conjunction with our station we also had a car wash, we kept a car wash supply inventory, and a few other minor automotive chemical items, and in the winter time antifreeze.

Q. How much money would you have had in inventory at that station? **A.** At this point strictly a guess, but I'd say $250.

Q. Would that be your best recollection? **A.** Yes.

Q. All right. And that would be the same type of inventory that an ordinary dealer would keep, is that not true? **A.** That's right.

Q. When you were operating the station, did you **[Dompier, R. 823]** have any additional costs that the prior owner didn't have in operating the station? **A.** Not that I can think of.

Q. When you were--before you operated the stations, when you were supplying

the stations, did you counsel your dealers on how to sell gasoline? **A.** No.

Q. You didn't go out and give them sales pitches about how to sell their product? **A.** Not on gasoline, we let them handle that themselves.

Q. Would the only connection you would have with them, basically as far as sale of gasoline, would be to pick up their money and take their orders for fuel? **A.** That's right.

Q. And in taking an order for fuel, would that constitute a telephone call to your bulk plant, telling them that you need another load of fuel? **A.** Generally.

Q. And then collecting money. Would it be getting it in the mail or going by and picking it up? **A.** Usually it was picking it up.

Q. After you started salary operating the stations, there wasn't any need, was

there, for anyone to go **[Dompier, R. 824]** out and collect the money from you, is that correct? **A.** That's correct.

Q. Moving on, when you were operating the station on Third Avenue, what percentage of your sales were Texaco credit card? **A.** A little bit less than 50 percent, I think.

Q. Did you find at any time when you were salary operating these stations that people would deviate from their route to purchase gasoline? **A.** Are you speaking now of the Third Avenue station?

Q. Any of your salary operated stations. **A.** There were times when it appeared as though they would deviate their route to a slight extent.

Q. What gave you that indication that people would deviate their route? **A.** When the prices were low, the volume would go up.

Q. What stations in the vicinity--well, anywhere, did you consider to be competitors of yours when you were supplying the Third Avenue station? **A.** Third Avenue station, you want specific stations that I considered to be--

Q. Yes, sir, in the area where they were. **A.** All right. The Third Avenue station, the ones that I watched most generally were the Fill-em' Fast at Second and Browne, an independent station at **[Dompier, R. 825]** Second and Lincoln, another independent station at Third and Monroe. And for that particular location those were the three that I watched most generally.

* * *

THE COURT: Let me interrupt a little bit. What do you mean, you said you watched two independents?

THE WITNESS: I would watch their posted retail prices.

THE COURT: What independents?

[Dompier, R. 826]

THE WITNESS: The one on the corner of Second and Lincoln. It is now called a Quik Stop. Back in those days, I think it was called Pay and Take It then. There was one on Third and Monroe, on the northeast corner, and I don't know what that was called now.

THE COURT: All right.

Q. (BY MR. WHALEY) Was there a Fill-em' Fast you said? **A.** And a Fill-em' Fast on Second and Browne.

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[Dompier, R. 829]

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Q. (BY MR. WHALEY) All right. Did you consider any stations that were flying the Texaco brand to be **[Dompier, R. 830]** of any significance to you, to your

stations that were flying the Texaco brand? **A.** At any of our stations?

Q. Yes. **A.** There was only one that I really paid attention to at all. That was the station run by Al Allen on Northwest Boulevard.

Q. What about that station that made you pay attention to it? **A.** Because at certain times he was relatively competitive on gasoline, and he appeared to be doing a pretty good volume.

Q. And if Mr. Bevan had posted the same price as you, do you think you would have watched him similarly to having watched Mr. Allen? **A.** Not right from the start.

Q. You had to wait a while? **A.** To see what he was going to do, right.

Q. To see if he was going to come up or not? **A.** Correct.

Q. At your Freya Street station, did a member of your family buy the Freya Street station? A. Yes.

Q. Who was that? A. My father.

[Dompier, R. 831] Q. Then that was leased to? A. The company.

Q. John Dompier Oil Company? A. John Dompier Oil Company, (nods head affirmatively).

Q. And how much inventory did the John Dompier Oil Company keep for that station? A. Exclusive of gasoline?

Q. Yes. A. $200 to $300.

Q. Did you operate the station the same after you purchased it as it was operated before? A. We operated the same with the exception of the fact that it was company operated with salary employees.

Q. And the Monroe Street--excuse me. What stations or competitive area did you consider important for your Freya

Street station? A. Freya? I considered Market Street, all of the stations along Market Street. The one that was operated by Mr. Harder and supplied by us was a competitor. There was a Jackppot station on Market Street, and I believe at that time it was called a Vista. And then another one at Market and Wellesley. That is now a Quik Stop. Back then I think it was [Dompier, R. 832] called Pay and Take It, I believe.

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[Dompier, R. 836]

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Q. Now, going to your Monroe and Alice street station, can you tell me when you started salary operating that station? A. July of 1975.

Q. And did you change the operation of it after you purchased it? A. Only by putting in salaried employees.

Q. Was that station attendant serve?
A. Yes.
Q. And would your employees there wash the window if asked? A. Yes.
Q. And did they check the oil? A. Yes.
Q. Would they do anything the customer asked them to do? A. Pretty generally.
Q. I mean, as far as the automobile is concerned? A. Yes.
Q. What was the percentage of your credit card business at the Monroe and Alice station? A. That one was about 60 percent.

[Dompier, R. 837]

* * *

Q. If other Texaco stations priced as low as you [Dompier, R. 838] did, would you consider them to be competitive with you? A. Some of them I would have.
Q. Which ones? A. Are you talking again now about Monroe?

Q. Yes, sir. A. The one that Al Allen ran on Northwest Boulevard.
Q. If Hank Rigg had posted a price as low as yours, would you have considered him to be a competitor? A. Not right away really.
Q. You would wait to see if he could keep his price there? A. Right.
Q. If he kept his price there, would you consider him to be a competitor?
A. Probably after a period of time.
Q. What are the factors that determine from your standpoint whether or not a competitor can keep his price down long enough to become a competitor of yours?
A. Well, he certainly has to have a buying price that allows him to price at a certain retail level and make a profit.
Q. And if he doesn't have the buying price to price at the certain level to make a profit, then [Dompier, R. 839] he

can't compete with you? **A.** That's right.

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[Dompier, R. 843]

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Q. (BY MR. WHALEY) I am going to move on and I may be repetitious and I want you to assume something and I will read this back later. If you'll look at Mr. Al Allen's. And this is Exhibit 645, and I am going to ask you to assume something. I want you to assume that in November of 1975 that regular gasoline, retail tank wagon was 50.9 up until November 14, then it went to 51.9. Okay, just assume that for my question. Looking at your average DTW on Exhibit 588 [<u>sic</u> 558] that would reflect DTW 50.9, is that correct? **A.** That's correct.

Q. And if Texaco was selling gas to Mr. Allen on the same day at retail tank

wagon at 50.9, that would mean that they were the same for that period of time? **A.** That's correct.

Q. Now, when you posted the price of 51.6, how much margin was that above retail tank wagon? **A.** 7/10ths of a cent.

Q. All right. So, if a dealer was buying retail tank wagon, he would--and pricing it at 51.6 like you were, he would get 7/10ths of a cent a gallon, **[Dompier, R. 844]** is that correct? **A.** That's correct.

Q. However, when you were pricing at that station, what would your margin be in November of 1975? **A.** It was 7/10ths of a cent plus your distributor margin.

Q. How much is that? **A.** 3.95 cents a gallon.

Q. Plus 7/10ths? **A.** Plus 7/10ths.

Q. Would be how much? **A.** 4.65.

Q. In November of '75 at the bottom, how many gallons of gasoline did you sell? **A.** 162,749.

Q. All right. So your--if you take your margin of four point--

THE COURT: Mr. Whaley, you are going awfully fast for me, and--

MR. WHALEY: I will start over.

THE COURT: All right, I see it now. Is this the total gallonage and at this station?

THE WITNESS: Yes.

THE COURT: Freya Street station, all right. Go ahead. Slow it down a little bit. I can follow **[Dompier, R. 845]** it and I think the jury is probably in the same boat I am of trying to follow exhibits that we have never seen before.

Q. (BY MR. WHALEY) Yes, sir. On Exhibit 588 [sic 558] I'm going to start over just to make sure it is clear. You

would post the--you would write down the price at which you were selling gasoline to the public, is that correct? **A.** Yes.

Q. And that would be 51.6? **A.** In this case, yes.

Q. How about writing on the board the Dompier retail price 51.6? **A.** (Witness complies.)

Q. Then I'd like you to subtract from that your margin in that month to show your purchase price. Put Dompier purchase price below that. And that would be your purchase price from Texaco? **A.** Yes.

Q. All right. Write from Texaco right under that. **A.** (Witness complies.)

Q. Would you subtract your margin to reflect your purchase price in that month? **A.** (Witness complies.)

Q. In addition, it appears that you were posting a **[Dompier, R. 846]** price that would give you an additional margin

of 7/10ths of a cent, is that correct, looking at the exhibit? **A.** Yes, that's correct.

Q. So you would have to subtract 7/10ths of a cent to get your purchase price, would you not? **A.** No.

Q. 51.6 is your retail price? **A.** Oh, that's right, excuse me.

Q. What does that leave you as a margin between your purchase price and your selling price? **A.** .0465, 4.65 cents.

Q. That would be 4.65 cents a gallon of gas would be your margin between what they bought the gas for and what you sold it for, is that correct?

A. That's correct.

Q. Now, I'd like you to multiply that times the number of gallons you sold that month, which is 162,749.

A. (Witness complies.)

Q. Do you have an adding machine, Mr. Dompier? **A.** Yes, I do.

Q. That would mean your gross profit for Freya for the month of November 1975 would be $7,567.82? **A.** That's correct.

[Dompier, R. 847] **Q.** Now, I want you to take a dealer buying the product at retail tank wagon, which is 50.9, put dealer's retail price in the next column down below there. **A.** (Witness complies.)

Q. And let's say he posts a price exactly like yours, 51.6, meets your price. I'd like you to put dealer tank wagon below that, 50.9? **A.** (Witness complies.)

Q. And what margin does that give him?

A. 7/10ths of a cent.

Q. Would you multiply that by the same number of gallons that you sold?

A. (Witness complies.)

Q. That dealer buying at his price and selling at your price in November would have made $1,139.24? **A.** Yes.

Q. What's the difference in the gross profit that you would have received in that month and the dealer that I set up in this series of questions? A. $6,438.59.

Q. Thank you. You can move back to your seat.

Would you expect a dealer with that difference in gross profit to be able to price with you at 51.6 for very long? [Dompier, R. 848] A. No.

Q. What would happen if he did? A. He would probably go out of the gasoline business.

Q. During the period of the Seventies how often would you pick up gas at John Dompier Oil Company for delivery to retail stations? Would it be a daily basis? A. Pick up gas at the terminal? Q. Yes. A. Almost daily.

Q. Did you ever have any specific conversation that you recall with a

Texaco representative about buying the Monroe Street station and the Freya Street station? A. Yes, I did.

Q. Would you tell the jury the day, the approximate date of the conversations and whom you talked to? A. Well, it probably was--we bought the stations, or dad bought the stations in July of '75. I suppose we talked to Texaco maybe in June of '75, and I think the conversation was with Ralph Bauman and Bob Vogelman.

Q. And would you tell the jury the substance of the conversation, what they said and what you said? [Dompier, R. 849] A. Well, we told them that we were considering buying the stations and they encouraged us quite a little bit to purchase those stations. And even if we had to--I remember them saying even if we had to pay a little bit more than the

market price for those two stations, which we did--

Q. You paid a little more than the market price? A. Paid a little more than we thought the market price was, anyway.

Q. Do you remember any phrase that was given to you about the purchase of those stations? A. Yes. Something to the effect, Ralph Bauman said something to the effect that a thorn may turn into a rose tomorrow, or something to that effect.

Q. Do you have any recollection of the amount of gross income you thought you needed to receive from the Third Avenue station in 1975 to pay your expenses? A. Approximately $4,000 a mon h.

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[Dompier, R. 878]

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Q. (BY MR. ROBINSON) Now, Mr. Dompier, in the 1970's in Spokane was there a revolution or change in retailing, method of retailing gasoline? A. Yes, there was.

Q. And did we go from 100 percent self-serve and in the late Sixties into over 50 percent of self-serve--I am sorry, I meant from 100 percent full service in the late Sixties to over 50 percent self-serve by the mid 1970's? A. Well, I am not sure about those percentages, but we went from predominantly full-serve in the Sixties to a very high percentage of self-serve in the Seventies, yes.

Q. Would you agree, sir, that as we went from the mid-seventies that the predominant business [Dompier, R. 879] was then self-serve? A. Yes.

Q. And did we see on the scene here in Spokane fewer and bigger stations--

A. Yes.

Q. --selling larger quantities of gasoline? A. Generally.

Q. At lower overhead? A. Yes.

Q. And with lower mark-ups or margins?

A. Yes.

Q. And were some of the examples of those types of stations Husky Oil Company stations? A. (No response.)

Q. That displayed the Husky brand?

A. No, I don't think so.

Q. Okay, how about Vista? A. Vista, yes.

Q. Jackpot? A. Yes.

Q. Circle K? A. Yes.

Q. 7-11? A. Yes.

Q. Fill-em' Fast? [Dompier, R. 880]

A. Yes.

Q. Gasamat? A. Yes.

Q. Jet? A. Yes.

* * *

Q. As these new service stations arrived on the scene, did they--by simple circumstances draw gasoline business away from other stations in the area? A. Yes, I think they did, you bet.

Q. You certainly felt an impact on your business, didn't you, sir? A. Yes.

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[Dompier, R. 898]

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Q. Now, this morning you testified about a service station at North 4406 Monroe that I believe was formerly operated by Mr. Ray Koziuk? A. That's right.

Q. And a station at North 502 Freya that was also purchased from Mr. Ray Koziuk? A. That's right.

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[Dompier, R. 900]

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Q. Can you tell me why it was that you or your father--I believe it was your father purchased these two service stations from Ray Koziuk? A. Why?

Q. Yes, sir. [Dompier, R. 901] A. In detail?

Q. Well, in thumbnail sketch, if you will. A. Well, number one, they were good stations, they were good locations. We had--and I think the second reason that came in, we, as I testified this morning, we wanted to be able to exercise some kind of control over our own retail gallons, and by control I mean we wanted to be sure that we were going to sell "X" number of gallons this month and the same number, or close to it, the following months. And the third reason was that we had had

considerable difficulty with the retailers that was in there previously.

Q. By the name of? A. By the name of Ray Koziuk, and it simply solved a major problem for us. He was bootlegging gasoline. In other words, at least by our opinion, he was putting gasoline in there that was not Texaco and selling it as Texaco, and it was becoming a major problem for us, so this solved that problem.

Q. Was the main reason that you purchased both of those stations the fact that the previous owner, Mr. Ray Koziuk, was buying a considerable amount of non-Texaco gasoline and pawning it off to the public as Texaco gasoline; that is, selling it to the [Dompier, R. 902] public as if it were Texaco gasoline? A. Well, I am not sure it was the main reason. It was certainly a very important reason.

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[Dompier, R. 905]

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Q. Let me direct your attention now to Red Carpet Service, Inc. Do you recall when that was originally incorporated? **A.** Sometime the early to middle part of '68 would be my guess.

Q. And that was actually formally incorporated as a Washington corporation? **A.** I believe so.

Q. Are you or have you ever been an officer of Red Carpet, Inc.? **A.** No.

Q. Have you ever played any part in the management of Red Carpet Service, Inc.? **[Dompier, R. 906]** **A.** No.

Q. Has Red Carpet Service, Inc. ever been a part of the same corporate entity known as the John Dompier Oil Company? **A.** No.

Q. Has Red Carpet Service filed separate tax returns from those tax returns filed by John Dompier Oil

Company for each year the two companies were in existence? **A.** Yes.

Q. Did they maintain separate payroll accounts? **A.** Yes.

Q. Separate bank accounts? **A.** Yes.

Q. Separate charge accounts? **A.** Yes.

Q. Have you ever been consulted about the management of any of the Red Carpet stations? **A.** No.

Q. Do you view yourself as having played any part in the Red Carpet Service stations operations? **A.** No.

Q. Did you, when you dealt with the Red Carpet Service stations, deal with them as you would with any other dealer that you supplied? **[Dompier, R. 907]** **A.** Yes.

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[Dompier, R. 912]

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Q. Okay. Now, how many salary operated stations did John Dompier Oil Company have in 1972? A. '72? None.

Q. 1973? A. None.

[Dompier, R. 913] Q. 1974? A. One.

Q. And that was the one on Third Avenue? A. Yes.

Q. And what was the cross street? A. The address was 303 East. The cross street, I believe, was Spokane Street.

Q. 303 East Third Avenue at the intersection of Third and Spokane? A. Yes.

Q. And that was first open for business in July of '74, or thereabouts? A. That is when we first opened it.

Q. Yes, that was what I am interested in. A. Yes, July of '74.

Q. And that is when you first started salary operating the station? A. Yes.

Q. And that is the very first salary operated station that John Dompier Oil Company had, is that correct, sir? A. That's correct.

Q. And then when did you next open a salary operated station? A. In July of '75.

[Dompier, R. 914] Q. And which one or ones was that or were that? A. North 4406 Monroe and 502 North Freya.

A. The one at Monroe was Monroe and Alice? A. Yes.

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[Dompier, R. 1111]

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Q. Looking at the corporate filing for Red Carpet, who was the president of Red Carpet in 1972? A. John K. Dompier.

Q. That's your father? A. Yes.

Q. Who was the president of John Dompier Oil Company? A. John K. Dompier.

Q. Your father? **A.** Yes.

Q. Who was the secretary-treasurer of John Dompier Oil Company? **[Dompier, R. 1112]** **A.** Marjorie Dompier.

Q. That's your mother? **A.** Yes.

Q. Who was the secretary-treasurer of Red Carpet? **A.** Marjorie Dompier.

Q. The operations of the retail station owned by Red Carpet would have been under the supervision of your father, is that correct? **A.** Yes.

Q. And the operation of John Dompier Oil Company with respect to its sales of gasoline in 1972 would have been under direction of your father? **A.** Yes.

Q. Was it your father who set the price from John Dompier Oil Company to Red Carpet in 1972? **A.** Yes.

Q. And it was your father that set the retail price of gasoline at Red Carpet? **A.** I assume so.

Q. Now, looking at 1973 would you tell me who the president is of John Dompier Oil Company and the president of Red Carpet? **A.** The president of Red Carpet was John K. Dompier and John Dompier Oil Company was John K. Dompier up until August of '73.

[Dompier, R. 1113] **Q.** That would have been your father was president of both up until August of '73? **A.** Yes.

Q. And then did your father remain the president of Red Carpet after 1973? **A.** Yes.

Q. And in 1973 did his position as president of John Dompier Oil Company change? **A.** Yes.

Q. And looking at Exhibit 470, what was he listed as in 1973, the office he had? **A.** In 1973?

Q. Yes. That's the exhibit for John Dompier Oil Company, is that correct?

Q. Yes. I believe he was vice-president. A. In 1973 he is listed as president.

Q. How about 1974? A. 1974 he is not listed.

Q. He is a director? A. Yes.

Q. And who are the directors of John Dompier Oil Company? A. John K. Dompier, Marjorie Dompier and J. Neil Dompier.

Q. Who were the directors of Red Carpet in 1974? [Dompier, R. 1114] A. John K. Dompier, Robert Brown and Marjorie Dompier.

Q. You had two common directors between John Dompier Oil Company and Red Carpet? A. Correct.

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[Dompier, R. 1146]

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Q. Mr. Dompier, talking about the hauling allowance. Texaco was obligated

under its contract to haul the product to your bulk plant, is that correct? A. I believe that's correct.

Q. So the hauling allowance was something that you were paid to haul the product yourself, is that correct? A. Yes.

Q. And if you wanted not to haul the product, you [Dompier, R. 1147] could have just insisted upon Texaco hauling the product, is that correct-- A. I believe so.

Q. --in the contract? How long does it take to unload that 10,000 gallon truck? A. 45 minutes, 30 minutes. However--excuse me. It varies a whole lot between service stations.

Q. How long did it take to unload the truck at your bulk plant? A. About 45 minutes.

Q. And if you had 3,000 gallons of gas in the high test tank or the regular

tank, you wouldn't be able to unload a full truckload in your bulk storage, would you? **A.** Not a full truckload of regular. We might have been able to fill the regular tank and unload something else.

Q. Then you would have some left over in the truck? **A.** Not necessarily, no. We could have hauled diesel or premium gasoline at the same time.

Q. At Red Carpet was it the practice that if you bought a certain amount of gasoline you would get a reduction on the car wash price? **A.** It seems to me that that was the practice part of the time. That program changed frequently.

[Dompier, R. 1148] **Q.** When it was the practice, what's your recollection of the amount of gasoline you purchased before you would get a free car wash?

* * *

A. My recollection now was it was 15 gallons, but I am not at all sure on that figure.

Q. (BY MR. WHALEY) If you purchased 15 gallons, your best recollection is you would get a free car wash? **A.** For part of the time the Red Carpet opened. They changed that program several times.

MR. WHALEY: That's all.

THE COURT: Anything?

MR. ROBINSON: I don't think so, Your Honor.

THE COURT: Mr. Dompier, the hauling allowance that you were paid by Texaco, was that so many cents or a portion of a cent for a gallon of everything you purchased?

THE WITNESS: Of everything that we hauled.

THE COURT: So you were paid that whether you hauled it to the bulk plant or whether you left **[Dompier, R. 1149]**

the bulk plant and went to one of your service stations?

THE WITNESS: Yes. We were paid that, Your Honor, for everything that we hauled from the terminal. You mentioned bulk plant. If we hauled it from our bulk plant--

THE COURT: I used the wrong term. When I said bulk plant, I was referring to Texaco's bulk plant?

THE WITNESS: Right, we were paid a common carrier freight allowance for that.

THE COURT: On every gallon you hauled whether it went to your bulk plant or whether it went to your retail stations?

THE WITNESS: That's correct.

THE COURT: Is there any way that you can recall as to what your pattern was? Maybe you can break it down into time periods if you changed, as to how

often you would--what percent of the gas that you purchased was hauled to your bulk plant and dump it as opposed to just taking it from the Texaco terminal and hauling it to your stations?

THE WITNESS: No, Your Honor, I can't come up with any percentage, not now.

THE COURT: Was it more than half would go **[Dompier, R. 1150]** direct to the retail stations?

THE WITNESS: Yes.

THE COURT: I don't want to keep--three quarters? Let me ask you this: Was it your usual pattern to haul it directly to your retail stations as opposed to taking it to your bulk plant first?

THE WITNESS: Yes, it was.

THE COURT: But you can't break it down into percentages or anything?

THE WITNESS: No, I really can't at this time.

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[JOHN PHILLIP MORITZ, R. 1153]

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Q. Would you tell us your occupation, Mr. Moritz? **A.** I am a salesman.

Q. Who do you work for? **[R. 1154]** **A.** At this time I work for American Health.

Q. And what kind of business are you in? **A.** In the vitamin and supplement business.

Q. Where do you live? **A.** I live at South 5404 Willamette, Spokane.

Q. What business were you in in the period of the 1970's? **A.** I worked for Burroughs Pharmaceutical. I was a pharmaceutical salesman.

Q. Did you travel much? **A.** Yes, I did.

Q. Would you tell the jury where you bought gasoline during the period from

1970 to 1980? **A.** I bought the majority of my gasoline on East Third or up on North Monroe, the Texaco dealer that had car washes.

Q. Prior to the 1970's where had you been buying your gasoline? **A.** From '64 until that time, primarily from Bevan's Texaco up on North Wall and then downtown.

Q. On north wall and then Third and Lincoln? **A.** Yes.

Q. And how much gasoline would you be buying in a month? **A.** At least two tank fulls a week depending upon my **[Moritz, R. 1155]** schedule.

Q. What kind of car were you driving? **A.** I was driving a Ford Galaxy 500.

Q. How large a tank did it have? **A.** It was over 20 gallons.

Q. And you say in the Sixties you bought from Mr. Bevan? **A.** Yes, I did.

Q. Did you change your buying practices from Mr. Bevan to other stations? A. Yes, I did.

Q. And would you identify the stations you changed to? A. I went to the Texaco station up on North Monroe, the one that was, and the one that was on East Third.

Q. Why did you change buying from Mr. Bevan to those stations? A. Well, the company that I worked for figured out that if we could save 1/10th of a percent of each dollar's worth of gas that we would buy in a period of a year, we would save them over $10,000.

Q. Did you have to turn your gasoline expenses into the company for-- A. Yes, I did. When my boss worked with me he would also note gasoline prices.

[Moritz, R. 1156] Q. Was there a difference in the price at Mr. Bevan's

station and the stations you just described? A. Yes, there were. There was.

Q. What was the price difference as you recall? A. Roughly three or four cents a gallon.

Q. Did you have a Texaco credit card? A. Yes, I did.

Q. What percentage of your business that you bought in Spokane would have been bought on a Texaco credit card? A. I paid mostly cash unless it was for a tune-up. I found if I did that, then I wouldn't get into problems with not having enough money to tide me over through the month, so I paid cash for it primarily.

Q. Why did you buy Texaco gas? A. Well, I guess when I was young I believed some of the commercials on television, and my folks bought Texaco. It was the additives, they had the best

motor oil. I come from a family of Texaco people.

Q. Did you buy nonbranded gasoline? A. No.

Q. Do you have any opinions about whether or not John Bevan's stations were stations that you would consider buying from as well as the station on Monroe and Third? **[Moritz, R. 1157]** A. I would have preferred to buy from John because you would have gotten the service if the price were right, but the price was out of line.

Q. Did you consider that Mr. Bevan was in competition for your business as well as the station on Monroe? A. No doubt about it.

* * *

Q. What percentage of your gasoline sales in Spokane would have been from the Texaco station on Monroe or the

Texaco station on Third? A. I would say roughly 90 percent.

Q. Did you buy from any other Texaco stations? A. Only if you were caught at the situation that you needed gas and you might be out in the Valley somewhere and it wasn't feasible to go all the way back to town.

[Moritz, R. 1158] Q. If Mr. Bevan had been able to post a lower price or had posted a lower price than he did, would you have continued to buy from him? A. Yes.

* * *

[Moritz, R. 1164]

* * *

Q. Where do you now have your car serviced for the oil changes and the lube jobs and the-- A. Svoboda's Exxon.

Q. That's on-- A. 29th.

Q. Do you buy gas from him on occasion? A. Once in awhile.

Q. But you take your back room work up there as you use to take it to John Bevan? **A.** Some of it, yes, sir.

Q. Do you take it elsewhere besides Mr. Svoboda? **A.** Yes.

Q. Where is that, sir? **A.** McCollum Ford.

Q. For the gas station type work that you had John Bevan do, you now take it up to Lincoln Heights? **A.** Yes.

Q. And you didn't have that kind of work done, those kinds of needs fulfilled either at the Third Avenue Texaco station or at the North Monroe station, did you, Mr. Moritz?

[Moritz, R. 1165] **A.** Would you repeat that, please?

Q. That kind of work that you have done now at Mr. Svoboda's Exxon and you formerly had done by John Bevan, you can't get done either at the Third Avenue Texaco or the North Monroe

Texaco? **A.** No, because they are not in business.

Q. During the period of time we were talking about you could not get that service performed at either of those two stations, could you, Mr. Moritz? **A.** I could have them tune up the car.

Q. At the North Monroe station?

A. No. After he closed it, no.

Q. Before it was closed, could you get back room service tune-ups and that sort of thing from the North Monroe station or the East Third Avenue station?

A. No.

* * *

[EVA WALCH, R. 1169]

* * *

Q. Mrs. Walch, could you tell the jury your present home address? **A.** 3707 East Olympic, 99207.

Q. What area of town is that in? A. That is up in Hillyard area, East Hillyard, what is known as East Hillyard.

Q. Do you work outside the home? **[Walch, R. 1170]** A. Uh-huh. Yes, I have worked at the Bon Marche for 26 years.

Q. And what department do you work in? A. I work in the restaurant.

Q. Have you been served with a subpoena to be here today? A. Yes, ma'am.

Q. Do you know Mr. Gene Robinson, a Texaco dealer in the Hillyard area? A. Yes, I do.

Q. Could you tell the jury how you know Mr. Robinson? A. Well, I have known Mr. Robinson for several years, but for about the past 10 or better years he has been my next door neighbor, and for the past 25 years or better we--my ex-husband and I have always traded at his service station.

Q. Prior to 1975, as I understand from what you just said then, you were not neighbors with Mr. Robinson, is that correct? A. He married my next door neighbor and I really don't remember when that was, the exact year.

Q. Prior to whenever it was that he became your next door neighbor, sometime in the mid-Seventies, where did you buy your gasoline? A. In the mid-Seventies? **[Walch, R. 1171]** Q. Uh-huh. A. I always bought my gasoline--well, not always, but for the most part at a little self service Texaco station on the corner of Market and Fairview. I bought my gas from Mr. Robinson up until about '72.

Q. Prior to the time when you began to buy your gas from the Texaco station near the Bend Restaurant, is that about where that station is at? A. Yes, it is.

Q. About how much of your gasoline were you buying from Mr. Robinson? A. Prior to '72?

Q. Right. A. Well, I certainly never stopped there 100 percent of the time, but a good 90 percent, anyway.

Q. There has been some testimony in this case about the other station also located in that same general area on North Market. Some of them are branded stations and some of them are independent stations. Did you ever shop at those stations? A. I am not going to say I never did, but I would say very, very rarely. Maybe if it was right on empty and I didn't think I might make it down to Gene's or whatever, but always--most always at Gene's station.

[Walch, R. 1172] Q. Did you during this time period observe a difference in the price between Mr. Robinson's station and the station down near the Bend

Restaurant, at the retail price? A. Well, I not only noticed quite a difference in price but the thing I noticed even more so was the fact that they were both Texaco stations and that bothered me.

Q. Approximately what in your mind, and I am not trying to pin you down to an exact figure, was the difference between the two retail prices at the Texaco stations? A. This question has come up several times, and for the most part I am sure it fluctuated. I know I never would have left Gene's Texaco station for just a two or three cents a gallon difference, so I am venturing to say it was up seven, maybe eight cents a gallon difference, which to me was at that time an hour's wage if I filled up my gas tank. It was a big difference.

Q. Did you, after you noticed this difference in the price, did you

continue to trade with Mr. Robinson? **A.** I think I kind of weaned myself away. But after, I would say the fall of '72, I don't believe I ever traded with him again. I don't really--I can't say I **[Walch, R. 1173]** never did drive into his service station again, but I really don't think so.

* * *

[HAROLD HARDWICK, R. 1231]

* * *

Q. Mr. Hardwick, where do you live? **A.** 5105 North Oak.

[Hardwick, R. 1232] **Q.** How long have you lived there? **A.** Since '69.

Q. Are you one of the plaintiffs in this case? **A.** Yes, I am.

* * *

[Hardwick, R. 1273]

* * *

Q. Now that you reflect back on it, is it true that self-serve business as it

came into Spokane took business away from you? **A.** It hurt all of us with service stations.

Q. You, too? **A.** Yes.

Q. And that was self-serve business other than that one station, that Red Carpet car wash, right? **A.** Yes.

Q. In 1976 were there more self-serve stations than there used to be? **A.** I don't remember offhand, but I would say yes.

Q. And did that fact, the fact that there were more self-serve stations in 1976 also hurt your business? **A.** It probably did.

Q. Would you agree that it, in fact, did hurt your business? **[Hardwick, R. 1274]** **A.** It hurt some, yes.

Q. In 1976 did you find that self-serve stations generally charged less than full-serve stations? **A.** Yes.

Q. Was there about a six to eight cent difference? A. I would say yes.

Q. And while you were a Texaco dealer, did you observe, Mr. Hardwick, that there had been an increase in the number of what we call independent brand stations in the Spokane area? A. Oh, yes.

Q. And did you also observe a trend towards an increased number of self-serve stations in Spokane? A. Yes.

Q. And as far as you know, those stations were taking a larger and larger share of the total gas business as they increased in size and number? A. I would say yes, they did.

Q. And generally speaking, sir, is that--were those gallons being taken away from the full-serve gas stations like yourself? A. They were taken from everybody I would say, yes.

Q. But in general from the full-serve stations? A. Yes.

Q. And were there the type of customers that **[Hardwick, R. 1275]** continued to do business with you, the full-serve type of customers? A. After they left us they wouldn't come back, no.

Q. Pardon? A. If they went to a self service they would never come back.

Q. Okay. And did you go--were you able to retain for the most part your back room business that you enjoyed at that station? A. We lost business in it, yes.

Q. Pardon? A. We lost business in the back room.

Q. Can you tell me, though, whether you were able to retain most of your back room business? A. Oh, I would say we lost about at least 40 percent.

Q. And could you tell me where that 40 percent went to get the-- **A.** I don't know.

Q. It certainly wasn't to that Red Carpet car wash down the street? **A.** He helped it.

Q. Did he have any back room services? **A.** No, they didn't, but they would go down there for gas or less, they are not coming back to you.

Q. Did he have any type of facilities at the Red **[Hardwick, R. 1276]** Carpet car wash where they could work on cars? **A.** No, they didn't.

* * *

[WILLIAM FISHER, R. 1366]

* * *

Q. (BY MR. EBEL) Would you state your name and residence address, please? **A.** William Fisher, 17 West 704 Butterfield Road, Apartment 104, Oak Brook Terrace, Illinois, zip 60181.

Q. Are you presently employed by Texaco? **A.** Yes.

Q. What is your present job? **A.** Vice-president of the midwest region in the PPD Department.

Q. What is the PPD Department? **A.** Petroleum Products Department.

* * *

[Fisher, R. 1367] Q. * * * We have had a discussion off the record, and is it correct that the Petroleum Products Department covers marketing, refining and supply and distribution? **A.** Correct.

Q. Is it correct that that grouping of that department has existed since January of this year? **A.** Became operative January the 1st, 1979.

Q. And you are the chief operating officer for the midwest region of that department? **A.** I would call it the vice-president of the department.

Q. Are you the person with principal authority for operation of that department in the midwest region?
A. Yes.

Q. Immediately prior to becoming vice-president of the midwest region for the Petroleum Products Department, what position did you hold? **A.** From December 1, 1972 until the formation of the new department, I was vice-president of the sales department. It was later named the marketing department. Prior to 1972 I was an area vice-president located here in Chicago from June 1, '71 until December 1, '72. Prior to that time I was [Fisher, R. 1368] with Paragon Oil from June the 1st, 1964 until June 1, 1971.

* * *

Q. To whom did you report as vice-president of the **[Fisher, R. 1369]** sales department? **A.** Well, I had a

responsibility to the executive management of the corporation. The individual who I reported directly to in 1972 through August 1 of 1976 was James W. Kinnear.

Q. And his position was what?
A. Junior vice-president, and on August 1 of '76 reported to Mr. Annon M. Card, senior vice-president.

Q. And do you know to whom Mr. Kinnear reported, not the person but the title of the position? **A.** Well, the senior vice-presidents have a responsibility both to the president and to the chairman.

Q. As vice-president of the sales department, did you have responsibility for the entire geographic area of the United States? **A.** Yes.

* * *

[Fisher, R. 1372]

* * *

Q. As vice-president of the sales department, did you have responsibility for all different kinds of sales of refined products? A. Not all kinds of refined products, it was in the area of motor gasoline, lubricants and middle distillates, not aviation, not petrochemicals.

Q. For purposes of this deposition we are concerned with gasoline, so maybe we can have that understood from this point on. A. Right.

Q. With that qualification, did your responsibilities include all kinds of gasoline sales and what I mean by all kinds, would be consumer sales, sales to independent retailers, wholesaler [Fisher, R. 1373] sales, that kind of thing? A. Correct.

Q. And is it also correct that during the period of time that you held that position that you were the person within the Texaco organization who had overall authority for the sales department in the United States? A. I would not use the word authority, I had the responsibility.

Q. Were you the primary operational person in that area? A. Yes.

Q. And Mr. Kinnear had oversight responsibility over that? A. Right.

* * *

[Fisher, R. 1397]

* * *

Q. I want to show you now Exhibit 1. Just lay that there, if you would. To identify this for the record, this is a March 5, 1976 letter from J. W. Kinnear to Gorman C. Smith, Assistant Administrator, Office of Regulatory Programs, Federal Energy Administration. I want

to direct your attention, Mr. Fisher, to the second paragraph of this letter where Mr. Kinnear says, "Over the last several years the volume of gasoline we sell to Texaco distributors has increased at a dramatic rate while the volume sold directly to supplied retailers has [Fisher, R. 1398] suffered an equally dramatic decrease."

And he goes on to give some examples and the like and some figures, and I will represent to you that Mr. Kinnear in his deposition said that in early 1973 he discussed the trends set forth in paragraph two of his letter which I just read to you, with you, in the context of looking at 1973 distributor figures as compared to 1972.

* * *

Q. He wrote this letter in early 1976, and as you'll notice in the second paragraph there he says, "Over the last

several years the volume of gasoline we sell to Texaco distributors has increased at a dramatic rate."

Is it your recollection that that is a true statement? A. That is a true statement. Whether or not you call it all dramatic or not, I mean I forget the [Fisher, R. 1399] percentage of increase in '74 and '75.

Q. But-- A. But it was going like this.

MR. EBEL: The deposition indicates that he made a gesture there.

Q. But that had occurred over the past several years? A. No, not at the rate that it occurred in '74 and '75.

Q. It had occurred in '72 and '73 also, hadn't it? A. Not at that accelerated rate.

Q. But there was an increase? A. Yes, there was an increase. I think that is in that deposition there.

Q. Are you referring to your previous deposition, Mr. Fisher? A. Right.

* * *

[Fisher, R. 1401]

* * *

Q. And is it correct that you talked about increased allocation, does this mean increased-- A. Volume made available to them.

Q. And is it correct that by and large that was increased volume made available to distributors who were reselling through retail service stations? A. Well, during that period of time, we are talking about the FEA at that time, a distributor had a distinct advantage over an independent retailer. It was an FEA-17 number, and he could present that to the FEA to get his volume increased because of road changes, taking on new business. He could take on **[Fisher, R. 1402]** new business, like in our case

if we closed a service station, we couldn't transfer that volume to another service station. He could do that. He did not have the privilege, so he had a distinct advantage, a distributor in the allocation program.

* * *

Q. Exhibit 2, this is at page 57. Exhibit 2 to Mr. Manthei's deposition, the statement by Texaco to the Department of Fnergy says on page 14--it says actually the first word is on page 13. It says, "Thus the personal observations of west coast marketing personnel as confirmed by independent surveys of the Lundberg survey showed that the retail postings at distributor supplied Texaco stations were on the average several cents below the prevailing prices being posted by directly supplied Texaco stations, as well as below the prices of other major brand retail outlets."

Were you able to follow me on that?
A. Yes, sir.
Q. Do you remember that to be true?
A. Yes. Would you agree with me that being able to post a retail price on the average several cents **[Fisher, R. 1403]** below the prevailing price of directly supplied Texaco stations is a competitive advantage? **A.** Well, I have a problem with your phrase competitive advantage. I mean, the independent retailer could--he has a privilege of selling his product at any price he so desires. Evidently he chose not to meet that price at this other location.
Q. Whether he did or didn't, isn't it a fact that if you price at one--if station A prices several cents below station B, that station A is going to have a competitive advantage? **A.** To increase the volume.

Q. Price is important in this business, isn't it? **A.** Absolutely.
Q. In fact, it is the most important thing, isn't it? **A.** Not necessarily so, I wouldn't say it is the most important thing. If the prices continue to rise, it's going to become extremely important.
Q. As a marketing person, didn't you operate on the assumption that price, that although there might be other elements that would influence a buyer's decision, price-- **A.** Right, extremely important.
Q. And didn't you also operate on the theory that **[Fisher, R. 1404]** it was, of all the various factors, it was the most important? **A.** No, I am not going to say the most.

* * *

[Fisher, R. 1405] * * * Q. Is it correct that when you gave this

deposition, which was in August of '77, that it was your belief that the increase in the volume of distributors was in part at the expense of investment service stations' throughput? **A.** I would say not. It was at the expense of all other retail class of trade as well as investment, other independent retailers.

Q. All other retailers would include directly supplied retailers? **A.** Right.

Q. Like the kind who are the plaintiffs in this case? **A.** Well, I don't know anything about the plaintiffs.

Q. All other retailers covers it, I think? **A.** Yes, sure.

Q. You said earlier that you didn't have any guidelines or policies that you issued with respect to whether a distributor who began selling gasoline to the public through service stations would or would not still be entitled to

the distributor discount. Would it be correct also that you didn't have any guideline or policy with respect to where distributors--excuse me, whether or not which **[Fisher, R. 1406]** distributors were going to locate new stations?

* * *

Q. Would it be correct also that you didn't have any guideline or policy with respect to whether distributors were going to locate new stations? **A.** I don't recall of any written guidelines. There was no policy. But being a distributor myself, I think it would be prudent on my part to discuss this with my supply company as to whether or not this would interfere with the location that they had, say, a continued retailer.

During the time that you speak of here, and this is the area of '74, '75, I think many wholesalers went out, just established retail outlets to gain that

volume which they could get the FEA to approve their 17, and sell more product and consequently can prove their loan profitability.

Q. There were no guidelines or policies then on [Fisher, R. 1407] that subject?

A. No.

Q. Not as far as you were concerned?

A. Not as far as I was concerned.

Q. And you are familiar with the term dual distribution? A. Yes.

Q. And in the exhibit, Mr. Kinnear's letter which we referred to earlier on page two, he says in the second to last sentence of the first full paragraph, "As a result, there was considerable intraband competition in Texaco gasoline." Do you see that sentence?

A. Yes.

Q. And did you find that to be a true statement while you were a vice-president of sales? A. I felt that

there would be competition all over the country if they are located in close proximity of each other, or whether it be a distributor out of that or whether it would be another Texaco directly supplied retail outlet.

Q. At page 1 at the very bottom of this letter, after observing the dramatic increase in the volume sold to Texaco distributors, and the new decreased, equally dramatic decrease to directly supplied [Fisher, R. 1408] retailers, Mr. Kinnear says, "These trends create a severe problem for us and Texaco retailers. The economic viability of many thousands of independent retailers has been severely strained by this decrease in their gasoline sales."

Were you in agreement with that statement as of the date this letter was written? A. Yes, in principle.

Q. One of the reasons there was a severe problem for Texaco retailers was the fact that the distributors could buy at a lower price, wasn't that correct? A. I would not agree with that statement.

Q. You would not agree with that statement in any respect? A. Well, they purchase at a lower price, but this would not really creating any problem that we are addressing ourselves here to.

Q. The question is whether that was a problem in any respect as far as the viability of directly supplied retailers was concerned. A. It was the volume. See, our Texaco independent retailer was not getting the increased allocation like a distributor was getting.

Q. And wasn't it correct that one of the reasons [Fisher, R. 1409] that the distributor would be able to open a new station and have a basis for getting a

new allocation was because he would be able to buy at a low price? A. He saw the opportunity at that time, in my opinion, to make additional profits, because margins were high at that time. And would--and what would you do if you were in his place?

Q. You didn't see a trend of directly supplied retailers going out and buying new stations, did you? A. No, because they couldn't get a new allocation. They couldn't get a new station approved.

Q. You didn't see, for example, Joe Smith who was a directly supplied retailer on-- A. 22nd and Argonne.

Q. --going out and opening a new location like distributors did? A. That's correct.

Q. And the distributors did that? A. Yes.

Q. And then-- A. That is because of the allocation program.

Q. And isn't it correct that you believe that one of the reasons they were able to do that; that is, open new stations, was because they were able to buy **[Fisher, R. 1410]** at a favorable price? **A.** Well, they had a favorable price to start with, and this allowed him the privilege to improve his profitability by increasing his volume.

Q. Mr. Kinnear says at page 3 of his letter, the first two sentences of the second paragraph, "We believe that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance. We believe that they are inconsistent with the realities of gasoline marketing today."

Did you share that belief at the time of this letter, March of 1976?

A. Well, I think there is other factors. I did not read this letter before I went to Gorman Smith. I don't recall reading it at all.

Q. As of the time--at or about this time, March of '76, did you share the opinion that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser could be explained almost entirely by the magnitude of the distributor discount and the hauling allowance? **[Fisher, R. 1411]** **A.** Yes, a great portion of it.

Q. And isn't that really the same thing that you meant when you testified in the other deposition as we saw earlier, that the increase in the distributor volume

was partly at the expense of the directly supplied retailers? **A.** Yes.

Q. In late 1973, did you propose changing from the distributor discount to the distributor tank wagon? **A.** Sure I did, because I felt very strongly about that for many years before I even left the department to go to Paragon in '64, that we should have distributor tank wagon price instead of basing it off of the retail tank wagon price.

Q. And I go to page 76.

Mr. Fisher, at or about the time that Mr. Kinnear wrote his letter about the alarming increase in volume and the like, did you attend a regional managers meeting which discussed that situation? **A.** No, I did not attend it.

Q. Do you know somebody by the name of Castleberry? **A.** Billy Castleberry, certainly. He was the staff assistant to Mr. Dougherty, the general manager.

Q. And he worked in New York? **A.** Oh, yes.

* * *

[Fisher, R. 1413]

* * *

Q. (BY MR. EBEL) I want to show you Exhibit 2, which is a memorandum to the file over Mr. Castleberry's signature dated March 8, 1976, entitled Regional Managers Meeting, March 2 and 3, 1976, Distributor Volume Situation. I want to have you look at that and tell me whether you have seen that before. **A.** I have seen it.

Q. Did you see it at or about the time it was written? **A.** I am sure I saw it right after it was written.

Q. This addresses the overall problem of the distributor volume increase, does it not? **[Fisher, R. 1414]** **A.** Right.

Q. And on the first paragraph, Mr. Castleberry says that, "On March 2nd

and 3rd a regional managers meeting was held with the executive staff to discuss the very serious problem of rampant and alarming increases in distributor gasoline volume."

Was it your view at that time the increases were rampant and alarming? A. Well, you can use other words beside rampant and alarming, they were very concerning to us.

Q. Were those, giving some leeway for personal usage of words, did those fairly describe your reaction? A. Yes, very concerned.

Q. Now, --this letter rather than memorandum discusses a three-phase program that was decided upon, is that correct? A. Yes.

Q. The first--I don't want to have you read through every one of these, but if counsel will permit me, is it correct that phase one is described on paragraph

two involves the mailing of a letter of some kind to the distributors? A. Correct.

Q. And that phase two was a process of getting a [Fisher, R. 1415] new distributor contract-- A. Approved.

Q. And then phase three of the program was a price increase for distributors, wasn't it? A. It was the last resort.

Q. Phase one was basically voluntary counseling, wasn't it? A. Yes.

Q. And phase two was-- A. They were all--

Q. --contractual? A. At that time they were very much concerned about supply, and this--we gave the best contract in the industry at that time, a five-year supply contract. Most other companies gave three.

Q. And you said that phase three was the price increase? A. Would be the last step.

Q. Was that a last resort; that is, if the other two didn't prove effective? A. Right.

Q. And did you have to go to that last resort? A. Yes. As you know, we raised the price in PAD V.

Q. Would it be your judgment then that it was the judgment of Texaco--or let's correct that. Was it **[Fisher, R. 1416]** then at that time the judgment of Texaco that the root cause of this problem was the distributor price? A. Well, I wouldn't say the word Texaco, of the sales, of the sales marketing, you know, management people, yes, that's what it came down to, right.

Q. In January of 1977, in the petroleum allocation district No. 5, Texaco raised prices? A. Yes, sir.

Q. That is at the top of page 81. A. Right.

Q. How much was the distributor tank wagon price increased? A. In PAD V in January of '77?

Q. Yes, sir. A. One cent a gallon.

Q. Was there an increase in the retail tank wagon at that point? A. No, there was not.

Q. Was the effect of that then to narrow the then existing margin or differential between the retail tank wagon price and the distributor tank wagon price? A. Not the way you described it. It was to slow down our sales primarily in PAD V. We wrestled with the decision the last three months of 1976. I made **[Fisher, R. 1417]** the decision to wait until we see the year end figures. Then after we saw year end figures we saw no choice but no raise the distributor price. And after examining the Lundberg surveys and surveys furnished by others also, that

that particular class of trade could take an increase because they were selling below distributor, retail outlets were selling below, anywhere from three to four cents of Texaco branded outlets as well as major brand competition. This was not an easy decision to make and I therefore made it and recommended it to management.

Q. And management approved it? **A.** Yes.

Q. Gave its approval? **A.** Yes.

Q. For the reasons you just stated? **A.** Well, we also lost our processing agreement with Exxon in Benicia, January 1, 1976. We didn't have gasoline, we didn't have the amount of gasoline available that we were going to sell, so that was part of the decision, supply-demand. And if the thing--if the curve just kept going on we would have to buy gasoline on the outside which would be uneconomical. We couldn't get

a return on that [Fisher, R. 1418] price. It would have to pay for gasoline.

* * *

[ROBERT JOHN VOGELMAN, R. 1422]

* * *

Q. (BY MR. WHALEY) Mr. Vogelman, were you employed by Texaco during the period from 1970 to 1981? **A.** Yes, sir.

Q. And would you tell the jury what your duties were during the period for Texaco? **A.** I was a Texaco sales supervisor in the area for Spokane, and I supervised the retailing operation and part of the wholesale operation in the district.

* * *

[Vogelman, R. 1450] **Q.** All right. Now, looking at paragraph two, it indicates that wholesalers will be encouraged? **A.** Paragraph two?

Q. Yes, sir. "Wholesalers will be encouraged and motivated through the district to select and develop prime sites thereby improving retail representation, volume and profit, instructions which previously have been issued." Do you recall any prior instructions that were issued in the Spokane district with respect to encouraging wholesalers to develop prime retail sites? **A.** I can't recall any specific instructions. We were given counseling and goals and plans by management to develop new business in our consignee areas and in towns and in areas where we didn't have wholesalers or stations, investment type stations.

* * *

[Vogelman, R. 1478]

* * *

Q. When you reviewed these volumes that had been sold from 1970 to 1975, did you

notice any trend, any change in this marketing balance that you had been trying to maintain? **A.** Yes, I saw a change in it.

Q. And what did you see? **A.** I saw that the volumes to the distributors and the volumes to the retailers and the volumes through the tank truck dealer changing in their proportion.

Q. And who was growing? **A.** The distributor was increasing some in volume but our throughput was increasing also. It wasn't decreasing.

Q. Your letter here reflects that there was a large growth in volume to the distributors in 1972? **A.** Yes.

Q. And that would have been the John Dompier Oil Company? **A.** Yes, it would have.

Q. And this would have been in the same period of **[Vogelman, R. 1479]** time that the instructions had come out to

encourage wholesalers to develop retail sites? **A.** Yes, I said that before.

Q. Then did you notice any change in the type of stations that Mr. Dompier was supplying in 1972? **A.** I think that some of the units that he was supplying were gravitating toward self service, or at least the customer would fill up his own gas tank; there was no--the lube bay, I don't know that he had any of those. There may have been one, but I can't recall.

Q. So did you notice in the period 1972, 1973 that these stations were selling gasoline based upon price mostly? **A.** That type of retailing was based quite a bit on price, yes.

Q. And was within the Texaco brand? **A.** Dompier stations were branded Texaco.

Q. And during the same period of time you were encouraging the plaintiff stations to draw in their business by

giving better service, is that correct? **A.** Well, that was one of the parts of our function, was to get the retailers to give as good a service as possible, yes.

Q. Did you ever make a recommendation that the **[Vogelman, R. 1480]** retail accounts which were in 1972, have a lower buying price in order that they could post prices like you were observing at the stations supplied by the John Dompier Oil Company? **A.** I am not sure I understand that. Could you repeat it?

Q. You noticed stations in 1972 of the Texaco brand that were selling gas based upon what we call price retailing, is that correct? **A.** Yes.

Q. And at the same time you were encouraging the plaintiff stations to draw in people based upon giving service, is that correct? **A.** That was

one of the ways we were getting or helping our retailers to increase business, yes.

Q. And you had a specific program whereby you encouraged them to do that? A. Yes.

Q. Did you ever consider, in order to assist them in drawing in people or make a recommendation that their buying price be lowered so they could compete with these stations that were posting lower prices? A. You are saying did we ever try to get the retail tank wagon changed?

Q. Did you ever try to decrease their buying price? **[Vogelman, R. 1481]** A. No.

Q. All right. Now, it says in this paragraph through close rapport with the distributor you managed to counsel Dompier to not aggressively supply and solicit new accounts in Spokane, especially those in close proximity to

third-party accounts. What is a third-party account? A. That is the one that I was saying gives us throughput, or one of them. He is a Texaco wholly-owned station.

Q. Why were you counseling him not to build stations in the proximity of these throughput accounts? A. Well, I was of the opinion that the distributor is in business in the area, number one, to make a profit; number two, to fill a need where there isn't any service station, where there isn't any--someplace where there is a need for his station. That is why it should be there, and it was our opinion that it was only good business not to have, from his standpoint especially, not to build a station right across the street from our station. I am talking about an investment type.

Q. You were concerned that if his station was too close to one of your stations he might draw business **[Vogelman, R. 1482]** away? **A.** I think it was a concern, but I just didn't think it was good business to do that, it didn't make sense in my mind.

Q. It didn't make sense for Texaco either, did it? **A.** I don't recall. Well, yes, it wouldn't make sense for Texaco, no.

Q. Your purpose-- **A.** Of course not.

Q. Your purpose in counseling not to build stations in close proximity to yours was to protect Texaco's investment, was it not? **A.** I think that is one of the reasons, but I think it is also from the Dompier's standpoint to protect his investment. Why should he do that?

Q. Apparently you had to consult him not to do that in this period of time,

is that correct? **A.** Well, according to my letter and as I recall, I think one or two or three questionable, I don't remember now, units that I was concerned about.

Q. Being too close to yours? **A.** The Big West thing, yes.

Q. Were you concerned about his units being too close to your investment accounts? **A.** I think that was one of the considerations. I **[Vogelman, R. 1483]** think primarily as I try to recall, I was concerned about the image more than anything else, but I do know that was one of the considerations.

Q. Is one of the reasons you wouldn't want one of his stations too close to yours the investment account because he would draw business away from that account? **A.** Well, yes, of course, it could go either way, but yes.

Q. And your station might draw business from his accounts? A. Yes, it is possible. You never know.

Q. Did you consider the stations that he was supplying in Spokane to be in competition with your throughput stations? A. Yes.

Q. Even though your throughput stations were giving service, you considered his stations where they either had mini-serve or self-serve to be in competition, is that correct? A. Yes, I considered--well, of course, Dompier was operating that company, was operating in the Spokane market. They were in competition with certain stations. They were in competition with everybody in town, very definitely.

[Vogelman, R. 1484] Q. And this competition would be especially important in the Texaco brand, is that correct? A. Yes.

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[RICKY AL HASBROUCK, R. 1542]

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Q. Mr. Hasbrouck, give us your home address. A. North 6521 Washington.

Q. That is on the north side of town about how many blocks from the central business district? A. From the main--

Q. From the central district? A. About 65 blocks, I guess.

Q. Okay. Can you tell me, where was your service station located here in Spokane? A. On 4302 North Driscoll.

Q. Can you take the pointer that is there behind that map and show the jury the location of your station? A. (Indicating.)

Q. You will have to speak a little louder. What were the years of operation of your service station here in town? A. From June of 1971 through, I believe it is, the 1st of September '75.

* * *

[Hasbrouck, R. 1543] Q. Can you tell the jury how you got in the service station business? A. I had a brother-in-law, we was looking for a unit and I lived in Great Falls, Montana. I had a brother-in-law over here and we was talking one day to him and he told me there were several units over here for lease. So my wife and I drove over here. We looked around and we found one on Driscoll Boulevard that we liked.

Q. Did you talk to anyone from Texaco when you came to Spokane in 1971? A. We talked with Pat Riley, which was the Texaco representative at that time.

Q. Was that before you leased the station from Texaco? A. Right.

Q. What did Mr. Riley do with you at that time, if you know? A. Oh, he kind of interviewed me and told me about the unit.

Q. I am sorry, I couldn't hear you. He what? A. He interviewed me, gave me an interview and we talked about the unit, and said that the prior owner was willing to sell out.

Q. Where were you working at this time? [Hasbrouck, R. 1544] A. I was working at Great Falls, Montana, at a Conoco station.

Q. And can you tell the jury what your background is in mechanical work? A. I was in the Air Force for four years as an aircraft mechanic. Once I got out of that, I moved to Great Falls, Montana, and I worked for with Bob's Conoco for two years as a mechanic.

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[Hasbrouck, R. 1546] * * * Q. When you settled on that location on Driscoll and C, can you describe for the jury what you considered to be your traffic patterns in that area? A. Our traffic

pattern, we had the Veterans Hospital, Albi Stadium, refuse department, Five Mile and Nine Mile area was a traffic pattern. We had a shopping center within about six blocks, Shadle Shopping Center. That was about it.

Q. Then after you had been in the service station for some time, did you have occasion to deal with your Texaco representatives again, say, just in the first year there, 1971? Did the Texaco rep come to your service station on occasion? **A.** They averaged once about every week and a half, two weeks, they would stop by.

Q. During that time did you have occasion to meet other Texaco dealers in Spokane? **A.** Yes.

Q. And could you tell the jury how that would happen? **A.** One afternoon Pat Riley, my representative for Texaco, came and picked me up. We drove

around. He showed me the retail places of Texaco's. We stopped and talked to a couple of dealers that afternoon.

[Hasbrouck, R. 1547] Q. Do you know if you ever were taken into the station supplied by John Dompier Oil Company at that time by Mr. Riley? **A.** I never was, no.

Q. Were you aware at the time you leased the station that there were distributor supplied stations in Spokane under the same Texaco brand? **A.** No.

Q. Could you describe for the jury, you have shown them the picture, could you describe for them the kind of service station it was? By that I mean the physical appearance of it? **A.** My unit?

Q. Yes. **A.** If was a two bay unit, had two hoists, had two double pumps on the same island, had an office. It was a brick building. It was on a three

corner lot on Driscoll Boulevard, which is a well traveled arterial.

Q. Was this in a neighborhood? A. It was in a residential area.

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[Hasbrouck, R. 1550]

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Q. (BY MRS. WHALEY) About how many of your customers do you believe were trading on the Texaco credit card, about how many of your customers? A. 65, 75 percent.

Q. Was the Texaco brand identification important to you in your business? A. Very important.

Q. Why was that? A. Because it was well advertised on television, it [Hasbrouck, R. 1551] was introduced to the people and they knew what the Texaco star meant.

* * *

[Hasbrouck, R. 1552] Q. What type of equipment did you own in the service station, you yourself individually? A. I owned all my tune-up equipment, tire machine, jacks, the balance system, safe, the register, air hoses, all my hand tools.

Q. Can you tell us what was your purchase price from Texaco, what was it called? A. I believe it was $3,700.

Q. No, by that I mean what was the purchase price you were buying gasoline for from Texaco? A. Retail tank wagon.

Q. And then you could tell us generally, if you would describe for the jury, what you considered to be your competitive area in the sale of gasoline in Spokane? A. Well, I thought the whole City of Spokane was.

Q. Did you get to know your customers over the years? A. Quite a few of them, yes.

Q. Can you tell the jury generally where those customers came from, in your opinion? **A.** We have a lot of them from the Air Force base, from the south hill, from the Valley, a lot of them from community college came by.

Q. You mentioned that at the time you got into the **[Hasbrouck, R. 1553]** service station, you weren't aware of the distributor supplied stations here in town marketing under the Texaco brand. Can you tell the jury when it was that you did become aware that there were service stations supplied by the Texaco distributor here? **A.** I would say probably three, four months after I was in business.

Q. And how did that happen? **A.** I was going after parts one day down Monroe Street and I seen a Dompier Texaco truck dumping gas at the Monroe Street Texaco.

Q. When you say you were going after parts, do you mean parts for the business? **A.** Right.

Q. Did you observe any other Texaco stations in Spokane that were supplied by the distributor? **A.** Well, in our--when we were traveling around, right, we would see the Dompier truck at different units.

Q. Did you yourself over the years ever do what's been described as a competitive price survey of the Spokane market while you were in the business? **A.** I don't--

Q. Did you yourself over the years while you were a **[Hasbrouck, R. 1554]** Texaco dealer survey the market for retail prices? **A.** Yes. The first year or two we was in business my wife and I would drive around almost every night in different areas checking prices.

Q. And can you tell us where you looked at the time you were checking prices in those first years? A. The whole City of Spokane and the Valley.

Q. Did you observe any lower retail prices at the Texaco stations, other Texaco stations in Spokane? A. Yes.

Q. Can you identify those for me? A. The one in Hillyard on Market. There was one on Third Avenue, Monroe Street, one on Division.

Q. Would you take the pointer that you just had up there, Mr. Hasbrouck, and point to the locations of the stations that you just identified? A. The one on Monroe, the one on Market, the one on Third Avenue, and the one on North Division.

Q. During this period of time that you have been describing or actually all--I will rephrase the question to include the entire time that you were a Texaco

dealer, which I think you said was '71 to '75, did you observe the amount of the difference between those stations you have identified posting retail prices versus your own? [Hasbrouck, R. 1555] A. Between three to four cents a gallon.

Q. Did you have any conversations with your Texaco rep regarding those stations over the years? You can answer that just for the moment yes or no. A. Yes.

Q. And can you tell me who that was? A. Pat Riley was the first one.

Q. And anyone else? A. Andy Evans was my second representative.

Q. Can you tell me generally what you told Mr. Riley? A. Riley just said that he had no control over those units.

Q. What did you tell Mr. Evans? A. I talked to Andy Evans about the price variation, and it came down to a heated argument, which was, he virtually said

it was none of my business what those units did.

Q. Over this same period of time that you were surveying retail prices in Spokane, did you observe in any way any Gull stations in the market as well? A. The two that I really noticed was up on Francis by Fred Meyer.

Q. Could you use the same pointer again and show the jury the two stations that you are describing? **[Hasbrouck, R. 1556]** A. The two units right here.

Q. Did you know Texaco was supplying Gull Oil Company in Spokane at that time? A. No, I didn't.

Q. Did you notice any of your customers in those Gull stations? A. No, I don't think so.

Q. Did you notice any of your customers in the distributor station on North Monroe, the Texaco station? A. Yes, Mrs. Ferguson.

Q. She was a customer of yours? A. Yes, right. Mrs.--

Q. Any other customers? A. Mrs. Courman (phonetic), my next door neighbor.

Q. Did Mrs. Keller also trade with you? A. Correct.

Q. Any other customers? A. Mrs. Grace.

Q. Was she related to one of your employees? A. Yes, mother of one of my part-time help.

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[Hasbrouck, R. 1557]

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Q. Okay. During this same period of time did you attend any meetings sponsored by Texaco for Texaco dealers here in town? A. Yes, I did.

Q. And where were those? A. They were at the Ramada Inn at the airport, or one or two of them was downtown at the Holiday Inn.

Q. Who would run those meetings for Texaco, Incorporated? A. The employees of the Texaco bulk plant, I believe that is who worked them.

Q. Would it have been Mr. Evans or Mr. Riley? A. Right.

Q. Would Mr. Vogelman have run those meetings. A. Mr. Vogelman was there.

[Hasbrouck, R. 1558] Q. Okay. Can you tell me generally the types of topics that were discussed. A. Mainly just merchandise that they would have on sale, tires, antifreeze, if it was the right time of year, specials on oil, special on their polish and their waxes.

Q. Would it be fair to say that part of this was characterized as promotions for Texaco products other than gasoline? A. Correct.

Q. Now, during the years that you were a Texaco dealer here in town, can you tell us approximately what your margin

was? By that I mean the difference between your wholesale price and your retail price? A. We started out at four cents, then we went to seven. We tried to maintain a seven cent margin.

Q. Did it ever go higher than seven cents? A. Yes.

Q. Can you tell the jury the kind of circumstances that would warrant you to raise your margin? A. Well, we would have a poor month, then things weren't going real well. We needed a little extra money. We would raise up the gas by a little, depends on how much we needed.

Q. Can you tell the jury how you attempted to **[Hasbrouck, R. 1559]** compete over the years in this gas station, and by that I am talking about specials or lowering your price, that sort of thing? What did you do as a dealer? A. We always carried our price

signs on it, and we always made a survey and stayed as competitive as possible. At one time we even lost money doing it.

Q. Did you ever during those years attempt to meet the price of the station on North Monroe? A. I did one evening.

Q. Can you tell me when that was? A. That was in '72, I believe, in August of '72.

Q. Okay. And what did you do? A. One of my help wanted to pick up parts again down on Monroe Street, and when he came back he told me the Monroe Street Texaco was four cents less than I was. So I told the guys to hang onto their hat, that we was going to lower our price and we was going to sell gas.

Q. What did you do at that time? A. We lowered our price five cents a gallon.

Q. Where would this have been, in the middle of the day? A. That would have

been about 5:00 in the afternoon we did it.

[Hasbrouck, R. 1560] Q. What happened when you lowered your price five cents a gallon? A. We sold some gas and we lost some money.

Q. Can you describe for us what was happening at your station that evening? A. Well, we just--normally we get everybody coming home, we had people lined out in the streets to buy gas.

Q. Did you raise the price after that, or did it stay down? A. At 9:00 I raised the price back up.

Q. Okay. What was the reason you raised the price back up? A. We were just losing too much money. We was losing over a cent a gallon because I had employees that had to go home, and if I hadn't raised the price we would have been there all night.

Q. Did you ever talk to Texaco about remodeling your station to go into the self service, which has been discussed in this case? **A.** Yes, I have.

Q. Whom did you talk to? **A.** Andy Evans.

Q. And what were you told by Mr. Evans? **A.** That it would be almost physically impossible to **[Hasbrouck, R. 1561]** do it, that they would have to put another set of pumps in and more storage tanks, and couldn't justify the cost.

Q. With your buying price from Texaco at retail tank wagon, was there any way that you could have, if you had gone self service, competed with the North Monroe or the Freya or the Third Avenue stations operated by the Texaco distributor? **A.** I couldn't still meet their prices, no.

Q. Did you notice over those years, '71 to '75, a decline in your gas volume? **A.** Definitely.

Q. When your sales declined in the mid-1970's, what kind of an effect did it have on your back room business that you described? **A.** Well, our dollar per thousand gallons dropped off. We started laying off employees for lack of work.

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[ANDY EVANS, R. 1621]

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Q. Would you state your name? **A.** Andy Evans.

Q. Where do you reside, Mr. Evans? **A.** I reside here in Spokane.

Q. Were you served with a subpoena to appear in court today? **A.** Yes, I was.

Q. And what's your occupation at the present time? **A.** Presently I am

employed at Boyle Fuel Company in Spokane as a sales representative.

Q. Were you ever employed by the Texaco Company? A. From January of 1971 to the end of October 1975.

Q. And what were your duties with the Texaco Company? A. I was a sales representative.

Q. Did you ever work for Texaco prior to 1971? A. Yes, I had. I spent two summers during my college years working in the bulk plant in Spokane as a warehouseman.

Q. And what is your educational background in college, for instance? A. I graduated with a degree in political science **[Evans, R. 1622]** from Pacific Lutheran University in Tacoma, Washington.

Q. Will you tell the jury what the duties were of a sales representative in Spokane during the period of time that

you worked for Texaco? A. In general terms it was my duty and responsibility to act as the intermediary between the dealer and the company, and as such I functioned as a sales representative responsible for financial help of the service stations I was assigned. That included such things as competitive counseling, business analysis, merchandising and also sales.

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[Evans, R. 1625]

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Q. And who was your supervisor during this period? **[Evans, R. 1626]** A. Bob Vogelman.

Q. During the period of time that you were the Texaco representative, did you observe the competitive market in the stations at which the dealers you were counseling were in competition with? A. Yes. I was in very close contact

with the market situation just on the basis of the surveys we took to request repetitive price allowances. Price assistance is what we called it.

Q. In 1972, Mr. Evans, you were the Texaco dealer representative for the dealers you previously identified, is that correct? **A.** That's correct.

Q. And in that connection did you make any observations as to what was the chief competition that they were facing? **A.** The unbranded independents. And I felt competition within their own organization oftentimes was the key to their marketing strategy.

Q. What was the competition within their own organization? **A.** A distributor, what we called distributor accounts that were oftentimes in very close proximity with the same trademark as our own leased and open contract retailers, that on the basis of price

were **[Evans, R. 1627]** more competitive than our own direct supplied dealers.

Q. And what was the name of the distributors that supplied those stations you previously referred to?

A. John Dompier Oil Company.

Q. Did you make any observations in 1972 about the price posted at those stations compared to the price posted at the stations that you were counseling?

A. Generally they were two cents less than the prices posted by my dealers.

Q. Mr. Evans, during the period of time that you were the Texaco representative here in Spokane, were you aware that the stations that were being supplied by John Dompier Oil Company were receiving discounts from the John Dompier Oil Company in the purchase of gasoline?

A. I had been told.

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[Evans, R. 1632]

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Q. (BY MR. EBEL) Mr. Evans, did you ever receive any complaints from the dealers that you counseled concerning the retail pricing at the stations supplied by the John Dompier Oil Company stations? A. This was one of the more popular topics of conversation between myself and my dealers.

Q. It occurred frequently? A. Quite often.

Q. Did you relate those complaints to anyone in the Texaco organization? A. I, of course, asked my supervisor why this type of situation was existing and why it was occurring, and he said that he tried to do something about it.

Q. Who was your supervisor? A. Bob Vogelman.

Q. Did he tell you what he tried to do about it? A. He mentioned on numerous

occasions that he had [Evans, R. 1633] talked to John Dompier.

Q. Did you ever see any meetings between Vogelman and John Dompier? A. I did.

Q. Where? A. Too numerous occasions to count. They had a great deal of closed door-type meetings within the district office.

Q. Did you ever hear Mr. Vogelman or any of your superiors, Mr. Bollinger or Mr. Kerry, make an observation about the method of marketing in Spokane through the distributor as well as for the retail class of trade? A. Yes.

Q. And what period of time would you have heard that observation made? A. It was sometime during the period of the latter part of 1974 and the spring of '75 when gasoline supplies were becoming plentiful again. In other

words, there was an increased competition in the marketplace.

Q. Mr. Evans, in that period of time, in late 1973, late '74 or '75, would you tell the Court and jury who within the Texaco organization these observations were made by, the name? [Evans, R. 1634] A. Bob Vogelman.

Q. And that was in a conversation with you? A. At the district office.

Q. And was there anybody else present at any of these conversations? A. Ralph Bowman and Mike Edmonds.

Q. Were they also Texaco employees? A. Yes, they were.

Q. And I would ask you now, what were the observations made about the marketing of Texaco products in Spokane by distributors and by retailers? A. They observed that at the time it was like a two-headed snake, sooner or later Texaco was going to have to make a

decision as to which method of marketing they wanted to pursue here in the City of Spokane.

Q. They were in conflict? A. They were in conflict.

Q. During the period of time 1972 to 1973, did Texaco institute any programs to attempt to make their dealers competitive? A. Not as concerns the price.

Q. They didn't do anything about the price? A. Texaco traditionally has the highest tank wagon in town, but they didn't offer any incentive as far [Evans, R. 1635] as price.

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[Evans, R. 1654]

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Q. Were you as sales representative at this time for Texaco, did you then feel it was important in your attempt to stay personally informed to see what the

other major companies were doing in this area? A. That's correct.

Q. Companies like Standard Oil of California that marketed Chevron products?

You nodded your head affirmatively.

Is that right? You have to answer out loud.

A. Yes, I did.

Q. Union oil company? [Evans, R. 1655] A. Yes.

Q. Exxon? A. Yes.

Q. Phillips? A. Yes.

Q. While Conoco was still here, Conoco? A. That is also true.

Q. Husky? A. Yes.

Q. As well as these independents that you alluded to a minute ago, is that correct? A. That's correct?

Q. Because they were all competitors of your stations, weren't they, Mr. Evans?

A. They were all within the marketing area.

Q. And they all represented competition to your stations that you were concerned with as the area representative, isn't that-- A. That's correct.

Q. Let's talk a second now about the independent branded retailers that you alluded to. Would they be stations like Vista? A. Yes.

Q. Fas Gas? A. Yes.

[Evans, R. 1656]

Q. Fill-em' Fast? A. Yes.

Q. Jackpot? A. Yes.

Q. Husky, or maybe that is a branded station? A. Husky was treated as an independent.

Q. Hancock? A. Hancock. Hancock was treated as an independent.

Q. Gasamat? A. Also an independent.

Q. Were all these stations that I just referred to competitive stations from a

price standpoint; in other words, were they selling gas on a self service basis and advertising prices competitively?

A. The greater percentage of all those marketers you mentioned were advertising prices on a competitive basis.

Q. That's the last group that I just referred to? **A.** Yes.

Q. Did you observe in the years 1972 up until the time you left any kind of a trend in the Spokane market? And to be a little more specific about that, Mr. Evans, did you observe a trend that you might say was an increasing influence of these independent branded stations in the market over that span of **[Evans, R. 1657]** three or four years?

A. I observed due to a fluctuating supply situation that people changed their buying habits from traditional full service major branded oil companies to places where they could simply get

gasoline. And some of the residual thinking in that area still exists today.

Q. Well, is the answer to my question then, yes, that you observed the trend, at least of the consumers, the motoring public to favor that type of station as time went on, the self service gas station that advertised lower prices in that group that we were just talking about? **A.** Yes.

Q. Was that trend that you and I have identified now of concern to you as a representative of these 11 Texaco retailers? **A.** Of course it was.

Q. Is it fair for me to assume that that trend and the increased influence that that phase of the market had, which you and I just identified, had an adverse competitive effect on stations that were full service, such as your 11 stations? By that I mean, they lost business to that newer type of gas

station, is that fair? [Evans, R. 1658] A. Certain stations were affected more severely than others.

Q. I understand that is true and I will talk about that in a moment, but as a general proposition, is my statement accurate? A. It is.

Q. Well, you mentioned talking about individual stations, and I think you said some individual stations would be more affected than others. Is that a fair paraphrase of your statement? A. (Witness nods head affirmatively.)

Q. He nodded his head affirmatively. You have to answer yes so that Dave can hear you. A. Yes.

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[KEITH LEFFLER, R. 1705]

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Q. (BY MR. WHALEY) Dr. Leffler, what were you asked to do in this case? A. I was asked to analyze the pricing

at both the [Leffler, R. 1706] wholesale and the retail level in the Spokane marketplace, basically in the Seventies, and determine from that analysis whether there was economic issues that I could be of assistance in analyzing with respect to this case and with respect to the pricing in the Robinson-Patman Act.

Q. Were there any questions that you felt you had to answer sort of in order, one at a time, in order to analyze these issues? A. Yes. I felt that the way to proceed in my study of that was to sort of step-wise reach some conclusions. The first issue that I felt needed to be addressed was the--whether or not in fact different prices were being charged to different purchasers and/or the customers of those purchasers, in particular, of course, the Dompier Oil Company and the plaintiffs in this case.

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[Leffler, R. 1708]

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Q. What were the steps that you followed in analyzing the first question, or what did you do to analyze the first question concerning whether or not there were different prices being charged? A. Well, it probably appears to be a trivial question, look at the prices. But, in fact, from my prior work in the industry, I was aware that there are lots of things we might call allowances or discounts that can occur with respect to sort of the nominal or the list prices, if you prefer, that are being charged. So, first of all, I had to gain information on all the various discounts that were being charged, and then determine whether those discounts represented subtractions from the actual price of gas that someone paid, such things as [Leffler, R. 1709] competitive

allowances and discounts from tank wagon and what not.

Then in addition to that, I had to determine what price was being charged by the John Dompier Oil Company to his purchasers during periods where those were the relevant prices. So I had to look at that sort of thing and come up ultimately with a true buying price, net of all appropriate discounts, for the plaintiffs and for John Dompier Oil Company and for Gull Oil Company and for the stations supplied by John Dompier Oil Company.

Q. Why would you be looking at the prices charged to the customers of the John Dompier Oil Company? For the record, in this case we have been identified basically as stations that were supplied in Spokane. A. Two reasons, really. One reason is that ultimately I was going to be interested

in the impact in the marketplace of any price differences, and the impact in the marketplace was occurring at the level where you and I buy gas, at the customer level, so I wanted to ultimately see how it was impacting the customer level.

And, secondly, the Robinson-Patman Act specifically states that it concerns price differences between purchasers and their customers **[Leffler, R. 1710]** and/or their customers, if it's relevant. So for both those reasons.

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[Leffler, R. 1711]

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Q. And did you reach any conclusions after doing that as to whether or not there was a difference in price, either to the plaintiffs and the Dompier Oil Company and the Gull Oil Company or their customers? **A.** Yes, I did.

Q. And what was that conclusion? **A.** I concluded that the Dompier Oil Company paid a lower price for gasoline throughout the period I looked at, which is basically February 1972 through February 1981; that the Gull Oil Company paid a lower price for product throughout that period; that the **[Leffler, R. 1712]** Dompier supplied stations paid a lower price for much of the period, though there was periods where the supplied stations' price was as high as, or on occasion, greater than what the plaintiffs paid for brief periods.

Q. In analyzing this issue, did you take into account those period when the supplied stations were paying equal to or greater than the plaintiffs? **A.** Yes, I certainly did take that into account.

Q. So your answer to the first question that you imposed would be yes?

A. That's correct. I concluded that, in fact, different prices were being charged to different buyers.

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Q. (BY MR. WHALEY) Would you tell the jury what the second question was that you felt needed to be analyzed in order to complete this task? [Leffler, R. 1713] A. Yes. I was sort of approaching it so if I answered no to the first question, there was no need to go on. There was nothing for me to address any longer. But in fact, I found that different prices were being charged, there were other things to pursue. And the second thing I felt relevant was to determine whether or not the plaintiffs and the Dompier stations on supplied stations competed with one another, since if they did not compete with one another, there could not be an impact on the marketplace. And that's

going to be the ultimate issue I was concerned with.

The second question was to say did the Dompier stations or the Dompier supplied stations compete with the plaintiffs.

Q. Did you also analyze that with respect to the Gull stations? A. Yes, I did, and also did the Gull stations compete with the plaintiffs.

Q. Would you write your second question on the board for the jury? A. (Witness complies.) Again I paraphrased.

Q. Your second question is a paraphrase? A. Yes. Is there competition between the Dompier stations, competition between Dompier stations and [Leffler, R. 1714] the plaintiffs, the supplied stations and the plaintiffs and the Gull stations and the plaintiffs.

Q. What do you mean by competition? A. The sort of general notion of competition simply means that sellers, two sellers in particular are competing for; that is, attempting to get the purchase dollars of consumers. That is they are both trying to win the prize, and the prize is selling the product. So it's completely analogous to the competition in the consumer race; two individuals are trying to get the prize of being first, so trying to compete to get the purchase dollars of consumers.

Q. Would that mean that for every single person, regardless of where they are, they were competing for the dollar, or is it the concept of competing in the same market for the dollar? A. It's certainly not--to say that two sellers compete with one another is certainly not to say that every single customer either one of them might have, stands

ready to shift their allegiance or their purchases at, say very small changes in the offers.

For example, there are people who will only buy a Ford, there are people who will only buy a Chevy, but nonetheless those products compete very intensively because a set of people are willing to [Leffler, R. 1715] consider the offers made by either company in making their decisions.

To an economist there are really degrees of competition. It could be perfect competition which means that everybody is standing ready at 1/10th of a cent price difference to switch their allegiance, or more limited competition where there is a smaller set of the customers who are considering the two offers in making their decisions.

Q. Did you reach any conclusion as to whether or not there was competition

between the stations operated by the plaintiffs and those operated or supplied by the John Dompier Oil Company or Gull Oil Company? **A.** Yes, I did.

Q. What were your conclusions? **A.** I concluded that, in fact, the economic market in which sellers were competing for the purchase dollars was an area that included the Gull stations, the plaintiff stations and the Dompier stations, and that those stations, in addition to other stations in the marketplace, certainly were competing with each other; that this was a marketplace with lots of competition, in particular competition occurring among the stations that I was interested in.

Q. Were the plaintiff stations competing with other [Leffler, R. 1716] marketers like Fill-em' Fast, Exxon, that sort of marketer? **A.** Yes, they were.

Q. And were they competing with the stations operated or supplied by the Dompier Oil Company and the Gull stations? **A.** Yes. And even to a greater degree because an important issue in deciding how much competition there will be is how similar do consumers consider the two products. So in the case of the Dompier stations and the plaintiffs, they are selling a product that has a brand identity, a product that Texaco has spent lots of time and effort in advertising dollars on to let us know that their product has some uniqueness to it, and that the product sold by those two sellers is labeled identically and it is, in fact, the same gasoline. It has the Texaco brand on it.

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[Leffler, R. 1717]

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Q. How can there be competition between, say, the Dompier Oil Company and the plaintiffs when the plaintiffs are buying under a retail tank wagon contract and the Dompier Oil Company is buying under a distributor contract?

A. The competition refers to competition for the purchasers. The competition that's occurring is that competition to get the--to sell the gasoline to the people who need gasoline. The label we put on sellers is not relevant to that at all. We can call them whatever we want, but it's the substance that counts and not the form of the label.

So when Dompier is operating stations, he is clearly in direct competition with the plaintiffs. If he is not operating stations, then what I

am concerned with is the competition that exists between the stations he supplies and the plaintiff stations. * * * [Leffler, R. 1718]

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Q. Turning to the evidence that this jury has heard, are there any particular portions of that evidence that are important to you in determining the finding that these stations compete with each other? [Leffler, R. 1719] * * *

A. It's totally compelling in some sense that we have Mr. Vogelman, who I presume probably knows more about the marketing of Texaco in this particular area than anybody else, who states that, of course, there is competition between--

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A. So I said, Mr. Vogelman concluded that there was [Leffler, R. 1720] competition. Mr. Evans said that that competition was crucial. The entire

notion of competition, the most direct observation an economist can have of the presence of competition is a buyer decides to patronize one seller instead of another because the offer is better. And I have heard just a succession of individuals who had that exact reaction in the marketplace, who purchased gasoline from Dompier instead of from plaintiffs because the Dompier offer was better; that is, competition being exhibited in the marketplace, and there were other sorts of things related to that notion.

Q. (BY MR. WHALEY) So the answer to the second question is what? A. I don't know how to make it strong enough. The fact is there was certainly competition between these stations. There is no doubt in my mind of that issue.

Q. What was the third issue you felt you had to analyze after you answered the second question? A. Well, I now have--the prices are different that they are charged. They, in fact, compete for the purchase dollars of the consumers. The third thing I need to analyze is, did the prices they were being charged affect the competition; that is, did what happened at number one somehow translate down into an [Leffler, R. 1721] effect on these particular plaintiffs.

Q. How would you paraphrase that third question for the jury and write it up there? A. I would put it, did the price difference impact or affect the competition between those various buyers?

Q. Did you reach a conclusion based upon the evidence that has come into this case as to whether or not there was an impact on the competition between the

stations that were charged different prices than the plaintiffs during the period of time involved in this lawsuit? **A.** Yes, I did.

Q. What do you mean by impacted competition? **A.** I mean the ability of the plaintiffs to compete in different ways was impacted. I mean, the manner in which they competed was impacted by the fact that they were paying a different price than was another buyer. Perhaps the analogy of the race is appropriate again. If you have someone starting a race half a lap behind, the issue is, do they do things different than they would otherwise. So it's basically that. Is that competition between them impacted? Certainly the very fact they are starting out a lap behind has itself impacted the competition.

[Leffler, R. 1732]

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Q. Having answered the third question, backing up, did you conclude whether or not the competition between the stations or the customers of the stations was impacted by the price difference? **A.** Yes. Again in my mind there is no doubt as to the answer to that question, which is that very fact discussed by the Texaco individuals who were most familiar with the marketplace.

Q. Now, what was the fourth question you had to answer? **A.** The fourth thing I had to address having concluded yes to these three was, were the plaintiffs injured in an economic sense by this; that is, the price differential was affecting the competition between them but was it economically injuring them?

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[Leffler, R. 1733]

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Q. Briefly what injury, what evidence have we heard in this case would support the conclusion that the plaintiffs were injured as a result of the price discrimination? **A.** We have heard many customers who have testified that because of the lower prices at the Dompier stations, they reduced and, in some cases, ceased their purchases from these plaintiffs. That is exactly cases of economic injury resulting from these other facts.

Q. Was there any indication of that in the testimony that you listened to from Texaco? **A.** Yes. Again the Texaco witnesses, or at least [Leffler, R. 1734] some of them, and the Texaco documents, the Kinnear letter I referred to earlier, it discussed the problem that's occurring. The problem is the

loss of gallonage by stations like the plaintiffs as independent retailers to these distributor stations, the Castleberry memorandum that discussed the rampant increase in gallonage at the expense of the independent retailers. Again it's the same set of things that I utilized to conclude number three led me to the conclusion to number four, namely yes, they certainly were.

Q. And what was the final question that you had to answer to complete your analysis in this case? **A.** The fifth and, in fact, final question that I then had to address having answered yes to all these was, could I then quantify; that is, could I estimate or could I determine in dollars and cents what that injury was.

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[Leffler, R. 1736]

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Q. And the efforts you made in answering the fifth question was to quantify that injury? A. Yes, to see if I could quantify in dollar and cents what that injury is.

Q. What did you do to determine--to quantify the injury that you concluded had been suffered? A. Well, we are in a situation of sort of asking the question--the following question: Namely, what would the sales and profits of these plaintiffs had been if there had not been the price discrimination?

So the basic question that I am addressing is trying to determine what the market would have been like if the market was different than the market was. So the first sort of thing I have to address is, what would the buying price have been if there had not been

the price difference. It clearly can't be what it was.

Q. Some price would have to change? A. Yes. It's the race again. Someone is half a lap [Leffler, R. 1737] behind and we are going to analyze how would the competition be and sales and profits be if they would have started together. So someone has to move. Either the person ahead back or the person behind up or something else.

Q. What are, in your judgment, the reasonable alternatives as to how the price discrimination would have been eliminated in Spokane during the period of this lawsuit? A. I think we have some very basic sort of bounds we can look at in analyzing that. We know what Texaco charged the plaintiffs, we know what Texaco charged Dompier, and we know what Texaco charged Gull Company. So that in some sense, we are going to

expect their reaction to be some price within those bounds. So you have a high price and a low price. And obvious possibilities are you eliminate the discrimination in price by, for example, moving Dompier to the plaintiffs' position; that is, raising the buying price to the Dompier company, alternatively eliminating the price difference by moving the plaintiffs to the Dompier position; that is, lowering the buying price to the plaintiffs, or alternatively perhaps something in between. They might react by moving the plaintiffs' price down and the Dompier [Leffler, R. 1738] price up. So at some sense I think we can sort of characterize them up, Dompier price up or plaintiffs' price down or price in the middle.

Q. In order to determine, quantify the damages suffered during the Seventies,

would you have to determine the effect in the market at that time of a price change at the Dompier stations or the plaintiff stations to see what impact it had on the plaintiffs' volumes?

A. Yes. The impact that occurs, the competitive injury is something occurring at the level that most of us here operate in, namely the retail market. So that the impact that ultimately is going to occur or the change in the sales that the plaintiffs would achieve in the absence of the price discrimination will result from differences in the prices at the retail market. So a necessary step, in order to answer question number five, is to determine how the plaintiffs are impacted by changes in their own price, if what's happening is their buying price is falling, changes in Dompier's price, price increases to the Dompier

stations, if what's happening is the Dompier price rising, or both, coming together.

Q. So you want to analyze what happens to the plaintiffs' sales if the Dompier retail price [Leffler, R. 1739] increases? A. Yes.

Q. That's one issue? A. Yes, that is one necessary element to answering number five.

Q. To find out what would happen to the plaintiffs' sales if the retail price at the Dompier stations was raised? A. Yes.

Q. In like manner you want to determine from the market what happened or would happen to the plaintiffs' sales if they lowered their price? A. Yes, that's correct.

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[Leffler, R. 1774]

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Q. (BY MR. WHALEY) Dr. Leffler, would you briefly tell the jury what the different periods of time, how you handled them in determining damages? We heard about allocations, we heard about price control. I wonder if you could, just referencing the time line [Leffler, R. 1775] there, tell the jury the significance of those different time periods. A. Yes. I think it's easiest to sort of divide on July 1975, that's the date where Mr. Dompier acquired the Freya and the Monroe stations.

Before July 1975 there is a period, a period indicated on that chart extending from October 1974 through July 1975 when I have calculated no damages from the price discrimination. And the reason for that is that my method of calculation limits the damages to the

sales and profits that would be gained during the period that a retail price would change. During that particular period the Dompier supplied stations were, in fact, paying a price equal to or on occasion greater than what the plaintiffs paid. So there was no price difference and there would therefore be no change reflected in the retail market and therefore, of course, no increase in the gallonage. So that's a zero damage calculated period.

During the period from May of 1973 through October 1974, the amount of gasoline that a plaintiff sold was basically determined by the allocation rules. Now, the allocation rules would allow a plaintiff to sell an amount, and in fact nearly all of them would sell an amount that was determined by a previous [Leffler, R. 1776] period's gasoline sale. So what I did there was I did not

calculate any damages for any price differential that might exist during that period, I rather calculated damages because their allocation amount was less than it should have been if there hadn't been price difference.

A specific example: The amount of gasoline you could sell in October 1973 was based on the previous year's sales, October of 1972. The plaintiffs I determined sold less gas in 1972 than they would have sold if there hadn't been the price discrimination. They would have had bigger allocation therefore in nineteen-seventy--they would because they would have sold more, they would have had a bigger allocation for October 1973. I have calculated damages for that increased allocation they would have had because of the discrimination that impacted sales prior to the allocation period.

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[Leffler, R. 1778]

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Q. Can you tell us why you believe there was damage during the period of time when you calculated no damage?

A. Well, two reasons: First of all, the favoring of Gull is occurring throughout the entire period. Gull is always receiving a lower price and setting low prices at the retail level. I have not attempted to calculate any damages based on that. The data was not sufficient to allow me to do that and I haven't done it. So that discrimination existed, certainly lost sales resulted from that, but I haven't attempted to calculate them. In addition to that, and I believe probably more important than that--

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[Leffler, R. 1779]

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A. As I said, I think more important than that is the period I indicated there are no damages, basically the period after 1974 allocations are off, but the Dompier supplied stations are paying high prices. Dompier has raised their buying price up to retail tank wagon or above. Nevertheless, because of the prior period's discrimination, consumers have formed purchasing habits; that is, in the marketplace the Dompier supplied stations would be viewed as low price stations, the plaintiffs' stations would be viewed as stations with higher prices than them. And consumers, for example, would--some consumers would stop even checking prices at, say, Mr. Rigg's station [Leffler, R. 1780] because they have learned over a period

of time they buy gas at Monroe because it's cheaper.

In addition to that, the stations supplied by Dompier have set up a business operation that was based upon receiving a discount from tank wagon, high volume, low price kind of operation. They continued that kind of operation throughout that period. In fact, that period ends with the sale of those stations to the John Dompier Oil Company, so that I believe, in fact, the actual purchases of consumers were impacted even though they were paying equal prices there because of the earlier period impacting into subsequent periods.

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[Leffler, R. 1906]

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Q. And you only measured the effect, if any, upon the plaintiffs' stations by

four Dompier stations, not all of the Dompier stations, is that correct, sir? A. That's correct, I had all the owned stations in there, but not all the stations.

Q. And did you only really examine the data for your gasoline sales, for example, for the period of 1975 through 1978? A. I examined the data from '72 to '81.

Q. But did you base your calculations on the period [Leffler, R. 1907] 1975 to 1978? A. My calculations are based on '72 to '81. The regression analysis for the price relationships is based on data from July 1975 to December 1978.

Q. And that regression analysis, if we may, is the genesis or the springboard from which your damage calculations were made, is that correct? A. It is--as I hope I have explained it, certainly a piece in that analysis, yes.

Q. And did you then, using and relying upon the data that you viewed from July '75 through December of '78, extrapolate backwards in time to the period 1972 through 1975? **A.** I would rather say '72 through October '73. Since after October '73 there is sort of a different method of--either no damages or a different method of calculating them due to the allocations.

Q. Okay, and did you, though, still use your regression analysis data in measuring the effects during October '73 up through July of '75? **A.** You lost me there. The regression--the calculation during that period is either no damages, so it is really not based on regression analysis at all; that is, in my--number one up there is answered no, so I in some sense don't go on, there was no **[Leffler, R. 1908]** price difference for that period, and I did not calculate any

damages and the allocation period is based upon '72 in a general sense, '72 through May of '73.

Q. Just so we are clear on this, there was a period of time where all of the Dompier service stations that you measured were paying as much or more than the plaintiff stations, according to your calculations? **A.** I would have to look. The reason I hesitate is because the Third Avenue station was purchased by Mr. Dompier during the period where I have no damages, so that while the average of the four Dompier stations show no price difference, one of those four, in fact, has a price difference, that being the Third Avenue station. So I am not sure if I have-- I have the data right here I could look at but whether it has appeared where none of them are.

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[Leffler, R. 1958]

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Q. (BY MR. ROBINSON) Dr. Leffler, if your theory is right, that these plaintiffs have been damaged, would you expect that when Dompier stopped supplying a particular service station in a competitive area with one of the plaintiffs' stations that that particular plaintiffs' gasoline sales volume would go up? A. Which--what, stop supplying which gas station?

Q. A gas station, the Dompier gas station or a salary operated station that is very close to-- A. An important--

Q. --plaintiff. A. Freya, Market, Third or Monroe? Yes, I certainly would, if he stopped supplying one of those.

Q. And conversely, if we found a service station that was a Dompier

supplied station whose buying [Leffler, R. 1959] price at one day was lower than a plaintiff's price, but then several days later the two prices became equated or equal, would you expect there to be any change in the volume of those two stations? A. Well, that is a little more complicated. We would have to address; A, is it one of those four stations, one of the important ones; B, did it cause a change in the retail price; that is, those stations are doing a type of business based on a low selling price, and I don't expect them to immediately raise their retail prices, so, if indeed it translated into a retail price increase, yes.

Q. And if it did not? A. If the retail price didn't change?

Q. Right. A. Consumers are interested in retail prices. They don't care about wholesale prices. At least most of us

don't, so there would be no--the impact occurs through the change in the retail price.

Q. I want you to hold onto that very statement, if you will, and try to follow me through this. Let's assume that we have before us a large felt board and we have one of those velcro stickers on back of different symbols. We have one symbol that is a Texaco symbol. Let's assume we take that Texaco **[Leffler, R. 1960]** symbol and we stick it up the back of this big white board. Then we follow trucks coming out from that symbol and going down to the plaintiffs' stations. Then we also put on that board different stickers that show one for the Dompier offices and bulk plant and then one down below that for Dompier salary operated stations and one for Dompier delivered stations. Let's assume that we complete the

picture by putting one on over here for Gull Oil Company. Do you have that mental picture in mind? A Yes.

Q. As we come down from Texaco, Texaco first decides at what price to sell to the plaintiffs and Texaco decides at what price to sell to Dompier, am I correct in that? **A.** Yes.

Q. Okay. Now, there is no injury or effect on competition if those prices are different because they are different functional levels, correct? **A.** No. What period are you talking about?

Q. Any period of time you want to take a long as we have existing from this period right now are those two functions. That is all I put on the board. That is all we are concerned with. Dompier strictly a wholesaler, plaintiffs strictly retailers? **[Leffler, R. 1961]** **A.** For example, Dompier selling to a school district?

Q. That would be a good example, any competition there? **A.** No.

Q. Okay. Now, let's assume that Dompier then delivers gasoline down to a dealer supplied station? **A.** Yes.

Q. Okay. If Dompier, although he still enjoys a lower buying price than the plaintiff does, does not pass on any of that price advantage, on down to his dealers, do we have any effect on competition? **A.** No.

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[BEFORE THE COURT, R. 2124]

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MR. WHALEY: Your Honor, there were a number of areas that Mr. Litvack talked about and I am prepared to address all of them but are there--if there are any particular ones that the Court may wish me to address it might be more productive. There are two that I think may have--

THE COURT: One specific one is the argument that there were no salary operated stations prior to '74 and therefore in and of itself the damage calculations are flawed, and they are not broken out, I might say.

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[R. 2129] **THE COURT:** But is that the same circumstance where Texaco is selling to Mr. Dompier and he in turn is selling as a wholesaler? How can you compare that as being the sale of a commodity under the same circumstances?

MR. WHALEY: Let me see how to best explain this. The Robinson-Patman Act--

THE COURT: I can understand the theory where they are both retailing or where Dompier is buying at wholesale and then in fact with the knowledge of Texaco, I am satisfied there is reasonable evidence to establish that, where Texaco knows he is selling it at

retail, I can understand that, but my concern is the Dompier supplied, nonsalaried sales, where in fact he is selling as a wholesaler.

MR. WHALEY: The Robinson-Patman Act, if **[R. 2130]** you read Perkins v. Standard Oil was a case just like this one where the pricing, the discounted price was passed through two levels of distribution before it got to the retail level, but there was still a discount when it got to the retail level. Just like Mr. Koziuk. Mr. Koziuk still had a two cent price advantage over my client sometimes more than that, between '72 and '73 so the fact pattern is identical to Perkins versus Standard Oil. The impact on competition occurred at the customer level, the Robinson-Patman Act applies to competition between the favored and disfavored purchase or the disfavored purchaser and the customer of

the disfavored purchaser so the injury here occurs in competition between my clients and customer of the Dompier Oil Company. Now the customer of the Dompier Oil Company in 1972 is getting a two cent price advantage, so that is the level we look at now just like we look at the Dompier Oil Company when it is salary operating a station after 1975. At that level my clients have a competitive disadvantage of at least two cents a gallon, that resulted in a verdict for the plaintiff in Perkins versus Standard Oil which was affirmed by the Supreme Court. The Ninth Circuit reversed it saying that the level of **[R. 2131]** distribution it passed through two levels made the injury too remote, and the Supreme Court said no it is a third line injury and it covers the competition between the customer of the favored purchaser Mr. Koziuk and the

disfavored purchaser the plaintiffs. So when you are looking at the period of 1972 the favored purchaser is Mr. Koziuk and he has a two cent, just like Mr. Dompier in 1975 who has a four cent advantage. What Dr. Leffler has done is determined if Mr. Koziuk who is our competitive who has the favored price, paid our price then he has assumed that Mr. Koziuk would only raise his retail price by that two cents. Now he has testified, that is the same as looking at Mr. Dompier who has a four cent advantage and Mr. Dompier when he has to pay our price raises his price four cents. It is the same exact situation, it is just a third level of distribution which the Robinson-Patman Act covers. And so all Dr. Leffler has done is say that if under the knowledge that he gained in 1978, '75 through '78 that a one cent price increase at those

stations will have this impact on the plaintiffs' gallonage and has gone back to '72 and said that a one cent price increase at Mr. Koziuk's station will result in these gallonage increases.

[R. 2132] **THE COURT:** I don't understand. Is Texaco supposed to say to its wholesaler who is selling to Koziuk you have to sell that at the same price we are selling to the plaintiffs?

MR. WHALEY: No, the Standard Oil case that you are so familiar with addressed that, the same case a jobber case that said no, the remedial order said lower your dealer's price. The way Texaco would remedy this is not to raise Mr. Dompier's price, it's to lower our price, and that is what the remedial order in the Standard Oil case did, the order back to Standard Oil was lower the price to your dealers down to the level that is of Mr. Koziuk's level. Now

Texaco can control that price. It has given Mr. Dompier too big a discount and it is impacting competition at the customer level and that is prohibited by Perkins versus Standard Oil. It is one of the reasons this overcharge argument is so complicated because the price to Texaco--

THE COURT: Are you saying that Texaco sets its price based upon whatever Dompier is charging Koziuk.

MR. WHALEY: If it is going to give a discount, and the discount is too great to cover, if it is impacting competition just like--let's take [R. 2133] the period Mr. Dompier is not selling at retail. It is obvious to me that 3.95 cents is way more than the discount should be. In fact he can use all that at the retail level. There may be some level that one could say that it was cost justified. But there is no

evidence in this case or in Perkins versus Standard Oil that that is true so if you read the instruction out of Perkins versus Standard Oil where you are a wholesaler and a retail, you have to price so that the impact on competition at the customer level is not there, otherwise Texaco has to change its pricing system. It can't give Mr. Dompier a discount that he can pass on to another station and immediately impact competition with the disfavored purchaser, that was the whole Perkins versus Standard Oil case. So Texaco could have remedied this by merely lowering the price to the plaintiffs or raising the price to Dompier, I mean it is their choice but there is not anything that's magic about how they eliminate price discrimination.

(Discussion off the record.)

MR. WHALEY: Well, here is the--I am sure the Court has read Perkins but Mr. Ebel has pointed out to me in my brief where it is, and basically what I am saying is the holding in Perkins vs. [R. 2134] Standard Oil. Texaco controls the price at which they charge the plaintiffs and controls the price which they charge Mr. Dompier, so when the competitive injury occurs, they have to either lower the price to us or raise the price to Mr. Dompier. The fact that they are salary operated makes no difference in the competitive level at which this case is addressed. We could have tried this case if Mr. Dompier had never salary operated a station, if he had supplied stations throughout as long as they were getting a discount and as long as that was not injuring competition. Have I covered that? Any other questions about that?

THE COURT: What if Dompier was selling to Koziuk at the same price Texaco was delivering it?

MR. WHALEY: To the plaintiffs?

THE COURT: Yes.

MR. WHALEY: Then there wouldn't be any competitive injury. If Mr. Koziuk--

THE COURT: That is a decision that Dompier makes.

MR. WHALEY: That is a decision that Dompier made. If he wholesales that way Texaco is probably giving away some money they shouldn't be giving away but we would not be in here today unless, [R. 2135] there are circumstances where that could occur, I guess, but I can't fathom what they are.

THE COURT: Well, Dompier changes its prices daily and does Texaco run around and find out what Dompier is charging and sets its price by what Dompier is charging?

MR. WHALEY: It sets its price based upon the competition level at which it is being affected. What the Court is suggesting is if Texaco could give an intermediary any discount it wanted and it would be immune from the anti-trust laws if that intermediary turned around and sold it, kept one penny and gave the intermediary four cents and it was just destroying the competition between the customers, and that is okay because they made an intermediary sale. That is not true, Perkins vs. Standard Oil says you can't do that, Texaco would have to--they had notice, they could see that these volumes were drastically increasing in '72. Why is that, because the discount is hitting the competitive level at my clients' level, Mr. Koziuk is giving a better price. They have an obligation to do something, either to raise Mr. Koziuk's price or lower ours

and what the Court's questions implies is that if Texaco makes a sale then they can forget [R. 2136] about the impact at any other customer level, that is not what the Robinson-Patman Act says. Take an example if they gave Mr. Dompier a dime off of retail tank wagon and so he takes the dime, keeps a penny and the hauling allowance and gives Mr. Koziuk nine cents, I mean the implication is that because it is passed through to Mr. Dompier it is legal. Well, of course the Robinson-Patman Act says if it affects competition at the customer level, not just the purchaser but the customer level it is still illegal. And that is what we have here is a discount passed through Mr. Dompier to Koziuk and Harder, and therefore the competitive level at that level is injured. And Texaco under the Robinson-Patman Act is obligated not to do that.

So what I am saying about Dr. Leffler's regression analysis is it only determines the impact on the plaintiffs' sales of a price increase at one of those stations. And whether it is salary operated or supplied really makes no difference.

The second issue that the Court made, I mean seemed to want to address was the overcharge. Undercharge theory. We are not trying in hindsight to predict what would have happened in the market from 1972 to 1981. Texaco discriminated in the [R. 2137] market and so we all have to project what would have happened.

The estimates that you have heard in this case are the most conservative that one can imagine in predicting what would have happened in the market. If it is an overcharge case, we have measured the specific damages caused by the

overcharge. Dr. Leffler has measured the sales lost to Dompier because he had a lower price. Now, that question was asked about six different ways. He concluded that the only way to measure that is to determine what would happen if Dompier paid the same price we did. Now, Texaco if it wants to argue to the jury that Mr. Dompier would not have done anything but keep selling gas, even with a price rise and the jury believes that, then we are going to lose the case. But that is not the evidence and it belies economic theory. If Mr. Dompier had a price rise of four cents he wouldn't able to eat it, he testified it would run him out of business in November of '75. He further testified that he would raise his price at least four cents. And so that is based upon the evidence. And that calculation calculates lost sales only--

THE COURT: I do recall his testimony [R. 2138] because I have it in my notes, that competition probably would not have allowed him to raise over four cents. I recall that testimony.

MR. WHALEY: That is just a jury issue. Texaco can argue that he would have eaten it and I think the evidence that every station that tried to compete in that market at retail tank wagon went out of business, it couldn't be done. So, I don' think that is speculative.

* * *

[Evans, R. 2901]

* * *

Q. Would you tell the jury briefly your duties, I mean very briefly, with Texaco between 1971, when you went to work for Texaco, and when you left?

A. Generally speaking my duties as a sales representative were to monitor sales of Texaco branded merchandise

through retail service stations. [Evans, R. 2902] And also in addition to that I was the intermediary between the company and the service station dealer, I was responsible for contracts, leases, pricing agreements, and et cetera.

Q. And what period of time did you first start these duties? A. I was employed by Texaco from 1971 until October of 1975.

Q. Did you start in January of '71?

A. That's right.

* * *

Q. (BY MR. WHALEY) Mr. Evans, if you could possibly move the microphone closer, the acoustics in here may not be as good as we would like.

During the period of 1971 did you, along with other Texaco employees, conduct surveys of the market to determine retail pricing? A. That is

correct. That was a part of our daily job activity during that time.

Q. And who would you conduct these surveys with? A. They were singularly conducted by each representative and presented to the immediate sales supervisor who in turn forwarded it at that time to **[Evans, R. 2903]** the district sales manager.

Q. And in these surveys did you determine prices, retail prices posted at stations operated by the plaintiffs in this case as well as stations supplied by the John Dompier Oil Company? A. That's correct.

Q. Would you tell the jury briefly which plaintiff stations you had responsibility for at that time? A. I believe in that time I was responsible for 11 investment accounts, including contract retailers. The locations were, if I can recall them all, starting with

Driscoll and C, Francis and Ash, Monroe and Houston, Wall and Houston, rather, Garland and Ash, Maple and Rowan, Monroe and York, Monroe and Sharp, 2321 Northwest Boulevard, Division and Waverly, and 8915 North Division.

Q. In those surveys, did you survey any stations that were supplied by the John Dompier Oil Company? A. Yes. They were a part of the market and, of course, we took note of what prices were being posted.

Q. Did you have any discussions with Texaco personnel in 1971, 1972 about competition between the stations that you had responsibility for and stations operated--I mean supplied by the John **[Evans, R. 2904]** Dompier Oil Company? A. It was my observation that retail prices posted by Dompier supplied accounts were substantially lower than what was priced by other Texaco dealers.

Q. Did you have any conversations about that with Texaco employees? **A.** Yes, I had discussed it with my immediate sales supervisor, who would be Bob Vogelman, and also had conversations with the assistant district manager and the district manager.

Q. In those conversations would you have any discussions about the price at which the Dompier supplied stations were purchasing gasoline? **A.** As far as price specifics, no, I didn't have an understanding of what Dompier was being provided product at what price level, however, it was painfully apparent that there was a substantial difference between the retail posted prices.

* * *

[Evans, R. 2905]

* * *

Q. (BY MR. WHALEY) All right. Can you answer that question yes or no? Did you

have any conclusions as to the--whether or not Mr. Dompier was selling gas to the stations he supplied at a price lower than retail tank wagon? **A.** Yes.

Q. Did you discuss that with other people within Texaco? **A.** Yes, I did.

Q. Including whom? A. Bob Vogelman, Tom Bollinger, Ralph Bauman, Mike Edmunds.

Q. What was your conclusion?

THE COURT: Just a moment. Who were--

THE WITNESS: To identify the particular individuals, Ralph Bauman and Mike Edmunds would be **[Evans, R. 2906]** territory supervisors. My immediate sales supervisor was Bob Vogelman. Tom Bollinger at that time was assistant district manager here in Spokane.

THE COURT: I will allow him to answer. Overruled.

Q. (BY MR. WHALEY) What were your conclusions? A. I believe that from my conversations with these Texaco employees, plus my observations in the marketplace, that John Dompier was providing product for a substantially less price than what Texaco was supplying their own dealers.

Q. Was this subject discussed between you and these other Texaco employees that you have just described? A. Yes, it was.

Q. Did you have any discussions about the impact of the Dompier supplied stations on the throughput sales of your Texaco dealers? A. Yes, I had conversations to that effect.

Q. And throughput is what? A. It is the sale of Texaco gasoline through stations in which Texaco had a direct or indirect investment. It was different from distributor supplied accounts.

Q. That would be stations that are operated by independent dealers such as the plaintiffs? [Evans, R. 2907]

A. That's correct.

Q. And in those conversations you had, what was the opinion expressed by you concerning the impact of the distributor supplied stations on your own dealers?

A. It was apparent not only from observations in my daily activities but based upon sales performance reports that were prepared by the company, that in my area the sale of gasoline per month rose, but at the same time the amount of gallonage sold in the investment accounts decreased. In other words, what we call throughput was showing month after month after month declining sales, but yet at the same time total supply or sale of gasoline in Spokane was increasing.

Q. At what stations was the total supply increasing? A. These accounts were generally supplied by John Dompier Oil Company.

Q. And did you reach any--have any discussions about the impact of those stations on your own dealers? A. Yes, I had conversations to that effect.

Q. And what were the conversations about?

MR. ROBINSON: Objection, lack of foundation as to time period and with whom.

[Evans, R. 2908] THE COURT: I think you should lay the foundation.

Q. (BY MR. WHALEY) In 1971 did you have any discussions about that? A. Yes, I did.

Q. And with whom? A. The four mentioned individuals, Ralph Bauman, Mike Edmunds, Bob Vogelman and Tom Bollinger.

Q. What observations did you make about the impact of the distributor supplied stations on the stations that you had responsibility for, such as the plaintiffs? A. Because of the apparent pricing difference posted in the marketplace, and the proximity of these accounts to Texaco investment stations, it appeared that there was an intense amount of intracompetition regarding price.

Q. Intrabrand? A. Intrabrand competition, (nods head affirmatively).

Q. While you were sales representative, did you have any opinions as to what the market for gasoline was in Spokane? A. Yes, I did.

Q. And what, in your opinion, was the market for [Evans, R. 2909] retail sales of gasoline? A. In terms of area, could you please define--

Q. Yes, just the geographic area.
A. Geographic area?
Q. Yes. A. Based upon my studies and my surveys and the travels that I conducted as a part of my daily activity employed by Texaco, it appeared that traffic patterns in Spokane were all more or less connected. The market as a whole, it seemed that one area would have an effect on another area, people would go out of their way to purchase gasoline.

* * *

[WILLIAM FISHER, R. 2989]

* * *

Q. (BY MR. EBEL) Was there any kind of yearly or other periodic review that Texaco did to determine whether they wanted to continue doing business with somebody as a distributor? A. Not to my knowledge.

Q. * * * Is it correct under this evergreen clause that you have mentioned, did Texaco have the right under the contract to, as you understood it, to cancel a contract with the distributor on a certain period of notice? A. Yes, and also the distributor had the same [Fisher, R. 2990] privilege.

* * *

Q. * * * Did you as vice-president then of the sales department or others in your department prior to any allocation regulations or embargo give to your regional or district people any guidelines as to what they should look for in determining whether they were going to continue to extend the distributor discount to a particular fellow who had a distributor contract? A. Not to my knowledge. We had a marketing plan. We had an annual

meeting every year where we discussed what the forthcoming objectives would be. And I can write down whether it was about a distributor, anything that fine.

Q. * * * I have shown you Exhibit 58. Is this a memorandum which you wrote on November 29, 1973 to Mr. Kinnear? **A.** I personally did not write the letter but I did sign the letter.

Q. And you approved its contents? **A.** Yes.

[Fisher, R. 2991] Q. And the contents went out over your signature? **A.** Yes, sir.

Q. And does this memorandum relate generally to your proposal to changing the method of pricing to distributors from a discount off retailer tank wagon to a distributor tank wagon price? **A.** Yes, sir.

Q. You say in the last sentence of the first full paragraph, "This change,

which has legal department approval, will give us desired pricing flexibility independent of yearly contractual arrangements, excuse me, contractual agreements?" By that were you saying that that would allow you to change a price to a distributor? **A.** Yes.

Q. At various times within the year? **A.** Yes.

Q. In the earlier deposition you testified at page 49, lines seven through 17, quote, "Why did you think that was necessary, referring to the flexibility to change the price? And I will show you this in a moment."

Question, this is a quote, "Why did you think it was necessary?" Answer, "Well, to have prices off retailer tank wagon throughout the **[Fisher, R. 2992]** country, and that is the way it had been done for the last 40 years, I could not see the rationale for us to continue to

do business that way, because in some areas competitive conditions are different, so this would allow you the flexibility to either increase or decrease, depending on the market condition in a particular piece of geography. Some distributors also provide different services than others, I will show you that." **A.** Okay.

Q. Is that a correct statement of the reasons behind why you felt it was necessary to have this pricing flexibility? **A.** Well, I think if you are running a business, you need that flexibility. When you are looking at a country the size of the United States of America because market conditions change in different areas, as I mentioned earlier, I felt strongly about that for a number of years.

Q. You also mentioned at the very end of that testimony that I read that some

distributors also provide different services than others? **A.** Well this is where I have a hard time coming up to give you what are the different services. They provide better services, I would say. They all have, **[Fisher, R. 2993]** you know, practically the same discount, some just do better than others.

* * *

[Fisher, R. 2995]

* * *

Q. (BY MR. EBEL) There is at page 72, line 21. In Mr. Kinnear's letter, he said at the bottom of page two, "These distributors are shedding many of their traditional functions and have concentrated their sales in very high volume outlets. This has reduced their per gallon overhead cost to a point where a good portion of the discount is not being utilized to defray their cost

of distribution at all? **A.** Absolutely.

Q. Is that one of the things you were referring to when saying the reasons for the pricing flexibility was that some distributors were providing different services? **A.** Yes.

Q. So if a distributor was not providing all those services, would you quote a higher price? **A.** May I cite an example? Dual distribution in a **[Fisher, R. 2996]** metropolitan city here, Chicago, versus a rural distributor out here 150 miles away, his product is delivered to his plant. He has smaller trucks. We deliver--large dual distributors pull right out of your terminal, right straight to their accounts.

Q. And those large dual distributors should, therefore, pay a higher price? **A.** In my opinion, yes.

Q. Because they are performing less of a service? **A.** Less of a service.

* * *

[BEFORE THE COURT, R. 3159]

MR. ROBINSON: While we are doing that, could I bring up another related matter, if I might, Your Honor? It occurred to me, in thinking about the closing argument, that insofar as Texaco's meeting competition defense is concerned, we really only intended to establish that there was meeting competition up until mid-1973. We don't really intend to argue that there was so-called meeting competition under the traditional sense of the meeting competition rule. If it is not too inconvenient for the Court, we would ask that a special interrogatory be given to the jury to find whether or not in fact meeting competition existed up until mid-1973, or at least May of 1973. Then

I think we have preserved the argument, if it's ever needed to be raised at the appropriate level, either with Your Honor or with the--whatever court, that the [R. 3160] meeting competition defense is good at least to part of the period. And what impact, if any, that has without the special interrogatory, I feel some concern about that the jury may think, well now, wait a minute, do they have to prove it for the whole time, and what kind of instruction can we give them that says you have to consider and then cut it off. I mean, I think the only way for it to really work, work so that all of us here can decide at the conclusion of this case where meeting competition really fits into this, is to say, give the special interrogatory to the jury, did Texaco in fact meet competition by extending a lower price, A, Dompier, and have a

blank or something of that nature, yes or no; B, Gull Oil Company, and then something to the effect you are only to consider whether they did that from up until May of 1973, or something of that nature, because then I think that would get their answer back, then we know what the facts were and what the actual proof was.

I would like you to give some thought to that in view of how else do we know whether there was a meeting competition for part of this period and how else can we then argue the a flexibility of the particular--

[R. 3161] **THE COURT:** Well, it seems to me that if the instruction that I am giving, that the Federal Energy regulations and statutes do not afford a defense, if that's in error, then clearly if the plaintiffs--if the

verdict is for the plaintiffs, the case would have to be retried anyhow.

MR. ROBINSON: I understand that, but I think we can avoid the retrial issue if we have a special interrogatory, for two reasons: One scenario would be, let's assume that the jury decides that there was meeting competition, but only up until May of 1973, which I think is a very sound decision on their part. I mean, what other evidence is there? But they say to themselves, wait now, it wasn't true through the whole period so we should ignore it, because reading Your Honor's instructions it says that's not the Federal Energy regulations that took place thereafter it doesn't excuse Texaco from continuing to meet that obligation of proving meeting competition.

The second scenario is that they could decide that the meeting competition defense was good up to that period of time and then come to a--or even decide it is not, and come to the conclusion that it is not, but be troubled by how it fits into the case. [R. 3162] I really think if a special interrogatory goes to the jury on this score and they come back with an answer, then we can all argue what the applicability, if any, of that particular meeting competition defense is. Does it simply go to the years in which it was in force; and, secondly, does the Federal Energy regulation in fact excuse Texaco from having to meet the competition. We then again preserve that issue, which I think is central to the Federal Energy Administration issue.

THE COURT: It seems to me that assuming they find it was met to '73 and

not thereafter, and assuming then the Court of Appeals should determine that Texaco was in fact entitled to rely upon meeting competition thereafter, subsequent to '73, it seems to me that a new trial would be required regardless.

* * *

[R. 3163]

* * *

MR. ROBINSON: --because the regulations don't really forgive, per se, the meeting competition defense, don't forgive the price differential.

So, it makes my closing argument, really, **[R. 3164]** about meeting competition meaningless, and I don't think I could even argue meeting competition, because one time I would be defending your instructions, and at the other time argue to the jury, you should consider it. And in all candor, again, I don't intend to argue beyond maybe even June

of 1973 that there was any meeting competition as you and I know that as the traditional concept.

THE COURT: Assuming the jury found that there was.

MR. ROBINSON: Adequate evidence?

THE COURT: That they found that Texaco's lower price was based upon meeting competition to '73, and then assume the Court of Appeals should determine that Texaco should be entitled to rely upon that.

MR. ROBINSON: Under Phone Tel. (phonetic) or one of those cases, yes, sir.

THE COURT: Whatever it may be.

MR. ROBINSON: Yes, sir.

THE COURT: Isn't another trial required so that the--

MR. ROBINSON: It would be all over as I view it then, Your Honor.

THE COURT: Because you are suggesting the scenario would be the Court of Appeals would say if **[R. 3165]** you were meeting competition on the date, the effective date of the price controls and allocation, regulations, then--

MR. ROBINSON: It's a legal price then. You see, then it's a legal price, and then the controls, whatever part they play in that, and Mr. Whaley and I can argue what part the controls play at a later date, either before Your Honor or before whomever, but then the issue is framed and we know whether in fact meeting competition is an item that the jury should consider and should be locked in place throughout the control period up until January 20 of 1981.

THE COURT: All right. I will hear from Mr. Whaley.

MR. WHALEY: Your Honor, first it's not the regulations that said there wasn't any meeting competition defense after 1973, it was the market, and the regulations just acknowledge that. So it's not that the regulations stop meeting competition, the market did.

Secondly, if I were Mr. Robinson I would argue this, and I think he can, that the plaintiffs, if we met competition between 1972 and 1973, there is no way that you can surrogate that period out under **[R. 3166]** their damage theory, and so they haven't proven their damage theory with reasonable certainty, and if they are meeting competition for that amount of time and you find it, then you can't surrogate it out and the plaintiffs aren't entitled to a verdict. I think we have not said our damages up to '73 are so much and then after are so much, and I would not disagree with that

argument. If the jury finds that they were meeting competition up until 1973, then the verdict should be for the defendant because there is no way they can separate that out. I think he can argue that and I won't deny it.

* * *

[CLOSING ARGUMENT - WHALEY]

[R. 3175]

* * *

We have no bone to pick with the John Dompier Oil Company. If Texaco had given any of my [R. 3176] clients the price that this John Dompier Oil Company got, I am confident that they would have tried to compete with that price just as hard as the John Dompier Oil Company did. But they didn't. They went and they started a deliberate program to begin to change someone who had been a distributor, who had markets like school districts and small accounts and

farmers, and you have seen that referred to by Mr. Kinnear in his very letter. And they deliberately, not ignoring the situation, they deliberately changed him, they encouraged him to go into the retail market, encouraged him to go into prime sites. They developed a specific program to do that and you see in this very period of time — the wholesale function that had been performed by the Dompier Oil Company is lost, and 90 percent of their gas business becomes retail gasoline sales through their own stations by 1975. We have no objection to sales to wholesalers. That is a legitimate function for wholesalers to be wholesalers. Our objection is when you take someone who has been a wholesaler and you turn him into a retailer.

* * *

[R. 3182] * * * Now the first element that will be listed to you in that instruction will be Texaco made a contemporaneous sale of gasoline to the plaintiffs, Dompier and Gull. That's the first element you will have to consider.

The second will be, was the price that they charged on those sales lower to the Dompier Oil Company or to Gull or to the customers of either one because the Robinson-Patman Act doesn't just affect competition between the Dompier Oil Company and the plaintiffs, it also covers competition between the customers of either one.

Let me give you an example. This is hypothetical. If Texaco had given Mr. Dompier 10 cents off of retail tank wagon price and he had only kept a penny of it and, so, he was giving his dealer nine cents of that margin, and you can

see that dealer could post nine cents below the plaintiffs and there would be substantial impact on competition. The Robinson-Patman Act applies to not only conflict between the favored purchaser and the disfavored purchaser, the plaintiffs and Dompier, but also the customers of either one. So during the period 1972 through early 1973, May 1973, you will focus on the [R. 3183] competition at the customer level, which will be Mr. Harder's station and Mr. Koziuk's stations and the Red Carpet stations, at that level competition between the plaintiffs and those stations. Mr. Dompier then acquires the first station in 1974, and then acquires two more in '75, then '77 and '78 acquires more. And you will then be concentrating on the competition between his salary operated stations and the plaintiffs. The Robinson-Patman Act

applies to both, and you will see that when you read the instructions.

The second issue is, did they charge a lower price to the Dompier or Gull companies, and in the period 1972 through March 1973 you will focus, did that price then, a portion of it, pass on to the customers of Dompier or Gull. I don't think that either one of those issues are going to be disputed.

The third issue will be, were the products of like kind and quality, was the gasoline the same.

The fourth issue will be, did the price difference impact the ability of the plaintiffs to compete with the John Dompier Oil Company, the Gull Oil Company or the customers of either. And finally, were they injured.

* * *

[R. 3189]

* * *

Also an effect on competition is that the Dompier Oil Company was able to use the advantage that it had to really acquire stations. In the early period it gave a discount to the stations it was supplying. They sold high volumes, raised the price to those stations until in 1975 they were paying at or near retail tank wagon, and they can't survive in that market doing that. So he buys then three [R. 3190] stations. In '74, he buys Third Avenue; in '75 he buys Freya and Monroe. He buys Mission and Magnolia later from Mr. Harder and he also buys Mr. Harder's Market Street station. The Market Street station held on a little longer. It held on paying a higher price up until he bought it, I believe, in 1978. But the impact is the same. As he raises that price, that man

can't stay in business over the long run by paying retail tank wagon, trying to compete in the self-serve market. Another effect on competition that's clear is the fact the plaintiffs were starting out behind in this entire period of competing.

* * *

[R. 3297]

* * *

During the period of 1971 through 1972, the [R. 3298] Dompier Oil Company was passing discounts to the retailers it was supplying, and if you will look at Exhibit 804, it gives you the period, and that's not Mr. Dompier's letter, that's prepared from invoices.

* * *

[R. 3303]

* * *

Another thing that was suggested is that the plaintiffs were trying to run

wholesalers out of business. Now, that's simply not true. If you look at the whole case, when Mr. Dompier is acting as a [R. 3304] wholesaler, there is simply no problem from our concern, and you will find when you read the instructions that there is a specific instruction that talks about how you can have an impact on competition if a wholesaler passes on his discount to a retail level.

This is not new. This is not something we have made up. This case could have been brought if Mr. Dompier had never salary operated a station, but it only supplied stations the whole time if he was passing the discount to them. The Robinson-Patman Act applies to customers, too, not just the purchasers. So you will find the instruction that says that if Mr. Dompier was passing on a discount and Texaco knew

about it, and you heard how they knew about it from Mr. Evans and from the long range plan where they talk about their knowledge of it, that that can be price discrimination. If the favored price is passed through the purchaser like Mr. Dompier to his customer, that's price discrimination. We don't have any problem with wholesalers being wholesalers and retailers being retailers, and don't get hung up as if we are trying to substitute some other form of business. There is a suggestion that somehow we are trying to substitute Mr. Sills or Mr. [R. 3305] Robinson for Mr. Dompier. I think that's an incorrect statement.

* * *

HASBROUCK V. TEXACO
JURY INSTRUCTIONS AS
GIVEN BY THE COURT
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-76-27

INSTRUCTION NO. 7

I will now summarize for you the contentions made by the parties.

The plaintiffs allege that: Texaco has violated a federal statute, the Robinson-Patman Act.

More specifically, the plaintiffs contend that Texaco has violated the Robinson-Patman Act by discriminating in price between the plaintiffs and some of their competitors. The plaintiffs allege that they are in competition with John Dompier Oil Company, with Gull Oil Company, and with customers of Dompier Oil Company, and they contend that they have been injured by reason of this discrimination.

Texaco denies that it has violated the Robinson-Patman Act, that plaintiffs

were injured by any alleged violation, and that plaintiffs were in competition with Dompier, Gull, and/or customers of Dompier or Gull.

Texaco also asserts an affirmative defense whereby it contends that its lower prices to Dompier and Gull were extended in good faith to meet an equally low price by a competitor of Texaco to Dompier and Gull.

INSTRUCTION NO. 8

The foregoing is merely a summary of the claims of the parties. You are not to take the same as proof of the matters claimed and you are to consider only the matters which are established by the evidence. The allegations of the parties have been outlined solely to aid you in understanding the issues.

INSTRUCTION NO. 9

You are instructed that the affirmative defense of cost justification set

forth by Texaco has been withdrawn from your consideration and is no longer a matter to be decided by the jury. You are not to concern yourselves with the reason for this withdrawal.

INSTRUCTION NO. 10

The following facts have been admitted by the parties to be true:

1. In the Spokane area, Texaco sold gasoline to plaintiffs, to other persons who have resold Texaco gasoline at retail, to John Dompier Oil Company ("Dompier") and to Gull Oil Company ("Gull").

2. The gross profit earned from sales of gasoline by a person who sells gasoline at retail is a function of the number of gallons he sells times his gross profit margin per gallon.

3. Each of the plaintiffs operated Texaco retail gasoline stations for the following periods:

Operator	Date	Place
RICK HASBROUCK (Rick's Texaco)	6/71 - 10/6/75	Driscoll & "C" St.
JAMES O. SILLS (Jim's Springhill Texaco Service)	10/61 - 10/29/78	Garland and Ash
ALVA N. BLUE (Al Blue's Texaco)	7/71 - 4/30/81	Maple and Rowan
JOHN W. BEVAN (Bevan's Texaco & Towing and Bevan's Northwood Texaco)	6/67 - 6/1/78	3rd & Lincoln
	8/56 - 11/30/75	Wall and Houston
RICKY A. RIGG (Five Mile Texaco)		West Francis

Operator	Date	Place
CLIFFORD N. ROBINSON (Hillyard Texaco)	1955 to 9/77	I-90 & Medical Lake
GENE C. ROBINSON (Hillyard Texaco)	1956 - 1979	Market & Wellesley
ALBERT E. ALLEN (Van's Texaco)	1966 - 5/19/81	NW Boule-vard
HAROLD C. HARDWICK (Harold's Texaco Service and Towing)	10/59 - 3/78	North Division
HENRY RIGG (Hank's Texaco)	1954 - 1980	Sharp & Monroe
VINCENT LIES (Lies Texaco & U-Haul)	1968 - 5/24/81	3rd & Maple

Operator	Date	Place
RALPH O. WEBBER (Webber's Auto Repair & Service Station)	9/65 - 9/79	Hamilton & Baldwin

4. During the above periods of time, each of the plaintiffs purchased regular, premium and/or unleaded gasoline from Texaco and resold said gasoline at retail.

5. Throughout the relevant time period, Dompier purchased regular, premium and/or unleaded gasoline from Texaco, and under its contract with Texaco, Dompier was licensed to sell all of this gasoline under the Texaco trademark.

6. Throughout the relevant time period, Gull purchased regular, premium and/or unleaded gasoline from Texaco. However, during the entire relevant time

period Gull never sold gasoline under the Texaco trademark.

7. Throughout the relevant time period, the prices Dompier charged to the retail service stations and car washes to which Dompier supplied gasoline were set by Dompier.

8. Throughout the relevant time period, the prices Gull charged to the retail service stations to which it supplied gasoline were set by Gull.

9. Gull resold part of the gasoline it purchased from Texaco at retail through retail service stations owned by it, and also resold part of the gasoline it purchased from Texaco to others who resold the gasoline at retail.

10. The gasoline which Texaco sold to plaintiffs and Dompier Company was, in all physical and chemical respects, of like grade and quality.

11. The Texaco Retailer Tankwagon price (RTW) is the price which Texaco charged retail service station dealers to whom it sells directly, absent any allowances off the RTW.

12. Since at least 1968, Dompier Company has purchased gasoline from Texaco at prices which were lower than Texaco's RTW.

13. Since at least 1970, Gull Oil Company has purchased gasoline from Texaco at prices which were lower than Texaco's RTW.

14. Texaco also paid Dompier Company an allowance, termed a "hauling allowance," for each gallon of gasoline which Dompier Company purchased from Texaco, as follows:

Time Period	Amount of Hauling Allowance per Gallon
June 1, 1971--April 2, 1972	.00446
April 3, 1972--August 31, 1972	.00445
September 1, 1972--August 12, 1973	.00478
August 13, 1973--March 9, 1974	.00511
March 10, 1974--July 19, 1974	.00544
July 20, 1974--August 31, 1975	.00587
September 1, 1975--June 11, 1976	.00616

Time Period	Amount of Hauling Allowance per Gallon
June 12, 1976--August 31, 1976	.00644
September 1, 1976--July 8, 1977	.0067
July 9, 1977--April 14, 1978	.00714
April 15, 1978--June, 1979	.00724

15. The following were the approximate differences between the contract prices of Compier Company and Texaco's Retailer Tankwagon price (exclusive of general allowances in effect during the period January to December, 1972):

Time Period	Amount of Price Differences per Gallon		
	Sky	Fire	Non-Lead
January 2, 1972 - May 22, 1973	*.0395	*.0395	
May 22, 1973 - July 31,1974	*.0365	*.0365	
August 1, 1974 - December 2, 1975	*.0395	*.0395	
December 3, 1975 - January 28, 1977	.0365	.0365	.0385
January 28, 1977 - June 1979	.0265	.0265	.0285

* All include .003 special allowance. None of these figures reflect the .01 allowance to Allen, Rigg and Weber.

16. The following were the approximate differences between the prices paid by Gull and Texaco's Retail Tankwagon price:

Time Period	Amount of Price Differences per Gallon		
	Sky	Fire	Nonlead
January, 1973 - June 12, 1974	.0525	*.0575	--
June 13, 1974 - July 9, 1974	.0525	*.0575	.0575
July 10, 1974 - June 9, 1977	.0525	.0575	.0545
June 10, 1977 - July 18, 1979	*	*	*

* Gull prices charged to discount off DTW (Distribution Tank Wagon) as follows: Sky: .0298; Fire: .0173; Non-Lead: .0173. The discount off of RTW based on new policy for Gull as follows: Sky: .0593; Fire: .0438; and Non-Lead: .0458.

17. During the relevant time period Dompier Oil Co. supplied the following service stations with Texaco-branded gasoline:

Location

North 502 Freya

North 3306 Monroe

Mission & Magnolia

North 2924 Market

East 303 Third Avenue

Hayford Road & Highway 2, Airway Heights

North 2527 Division (Red Carpet No. 1)

East 7208 Sprague Avenue (Red Carpet No. 2)

East 303 Third Avenue

Newport Highway

North 7902 Division

18. During the relevant time period Gull supplied the following service stations with gasoline:

Location

East 620 Francis

Newport Hwy., Mead

East 13819 Trent

East 511 Francis

North 2103 Division

East 5204 Sprague

North 1521 Argonne

South 2805 Grand

East 8006 Sprague

East 4422 Sprague

South 3728 Grand

East 936 Sprague

1106 North Pines Road

East 706 Main Street, Cheney

Route 1, Medical Lake

19. As of June, 1979, all Gull stations in Spokane were operated by individuals who were paid a commission by Gull for each gallon of gasoline sold through the station.

20. During the relevant time period, Gull was solely responsible for establishing the retail price at which gasoline was sold to the public at its commission stations.

21. Throughout the relevant time period, Gull had no bulk plant in the Spokane area.

22. During the relevant time period, Texaco granted a one cent allowance to A. Allen, H. Rigg and R. Webber.

23. Texaco agrees that the differences in appearance or operation of the plaintiffs' service stations and the Texaco branded retail service stations supplied by John Dompier Oil Company are not the basis for its claim that the stations were not operating on the same functional level.

INSTRUCTION NO. 11

I will now instruct you on the law relative to the plaintiffs' claims under the Robinson-Patman Act. Section 2(a) of the Robinson-Patman Act provides that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with

> any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

Section 2(b) of the Robinson-Patman Act provides that:

> Upon proof being made . . . that there has been discrimination in price . . . , the burden of rebutting the prima facie case thus made by showing justification shall be upon [the seller] . . . .

The seller may rebut a prima facie case:

> . . . by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by the competitor.

INSTRUCTION NO. 12

In order to recover damages for price discrimination by Texaco, a plaintiff must have proved by a preponderance of the evidence the following elements:

1. That Texaco made a contemporaneous sale of gasoline to the plaintiff and John Dompier Oil Company or Gull Oil Company -- that is, Texaco made a sale to that plaintiff and Dompier or Gull at or about the same time;

2. That Texaco sold gasoline to Dompier Oil Company or to Gull Oil Company at a lower price than was charged to the plaintiff;

3. That the product purchased by the plaintiff and the favored purchaser was of like grade and quality -- that is, of the same type (e.g., regular and regular, premium and premium);

4. That the effect of the discrimination produced a reasonable likelihood of substantially lessening competition in the sale of gasoline or to injure, destroy or prevent competition by the plaintiff with Dompier Oil Company or Gull Oil Company or with a customer of Dompier Oil Company, Gull Oil Company, or the plaintiffs.

5. That at the time it was charged the lower price, the competitor of the plaintiff was in substantial competition with the plaintiff;

6. That the plaintiff was injured in his property or business by reason of such discrimination; and

7. That the injury resulted in damage to that plaintiff in an amount which can be estimated and determined with reasonable probability, supported by reasonable data.

In this case, as in all civil cases, the plaintiff must prove each essential element by a preponderance of the evidence. If the plaintiff has proved each essential element by a preponderance of the evidence, there is sufficient evidence to support a verdict in favor of the plaintiff, and your verdict should be for that plaintiff unless Texaco has established by a preponderance of the evidence its affirmative defense of meeting competition, in which event your verdict should be for Texaco as to that plaintiff.

INSTRUCTION NO. 15

I have told you before that plaintiffs have the burden of proving their case. If they do so, then you must consider Texaco's so-called "Affirmative Defense." An affirmative defense is one which presents a legal justification for an action. Texaco has

the burden of proving any such defense it asserts by a preponderance of the evidence.

Texaco has pleaded as an affirmative defense that it was "meeting competition." This affirmative defense seeks to invoke the following provision of the Robinson-Patman Act:

> Upon proof being made on a complaint under the Act, that there has been discrimination in price, the burden of rebutting the prima facie case thus made by showing justification thereof, shall be upon the person charged with a violation of this section, by affirmatively showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.

Under this defense, Texaco contends that even if it extended to Dompier Oil

Company and Gull Oil Company lower prices on gasoline than it charged to each plaintiff, Texaco believed in good faith that the lower price was extended by Texaco to meet an equally low or still lower price offered to Dompier Oil Company or Gull Oil Company by one or more of Texaco's competitors.

Texaco has the burden of proving by a preponderance of the evidence that at the time it made an alleged discriminatory sale it in good faith believed that the lower price was necessary to meet competition for the buyer's business.

I will not instruct you on the facts and conditions which must be proven by Texaco by a preponderance of the evidence to establish the defense of meeting competition.

First, the good faith requirement of the law requires a seller to prove the existence of facts which would lead a

reasonable and prudent person to believe that the granting of a lower price was in fact necessary to meet the equally low price of a competing seller.

Second, a price discrimination based on meeting a lower competitive offer, even if valid, cannot be continued indefinitely based on the lower offer. The meeting competition defense exists only so long as the seller in good faith believes the lower competing price can reasonably be said to be available.

Third, lower price to one customer cannot be justified solely by virtue of its being part of the seller's normal pricing system.

The burden of proving this affirmative defense is upon Texaco. If Texaco has not proved all elements of its defense by a preponderance of the evidence, the defense must fail, just as plaintiff's claim under the Robinson-

Patman Act must fail if you find that plaintiffs have not proved all the elements of their case by a preponderance of the evidence.

INSTRUCTION NO. 16

A price discrimination within the meaning of Section 2(a) of the Robinson-Patman Act is a price difference; that is, a difference in prices charged to different customers. It means selling the same goods cheaper to one purchaser than another. The claimed price difference in this case is claimed by plaintiffs to result from Texaco's alleged sale of gasoline to the Dompier Oil Company and Gull Oil Company at prices lower than those charged plaintiffs and which price differences plaintiffs claim were passed through to Dompier Oil Company's customers.

With respect to each sale transaction in which a plaintiff claims that

Texaco unlawfully discriminated in price against a plaintiff in favor of Dompier and/or Gull, that plaintiff must prove that there was a specific difference between the price per gallon that it paid to Texaco for gasoline and the price Dompier and/or Gull paid to Texaco for the same type of gasoline at the same time.

To determine whether such a price difference exists, you should compare the price per gallon paid by that plaintiff with the price paid by Dompier and/or Gull for the same type of gasoline at or near the same time.

INSTRUCTION NO. 16A

There is evidence that Gull Oil Company, after it purchased regular and premium gasoline from Texaco, blended some regular and premium gasoline together at the station location and sold the blended product to the public.

You may consider this factor in evaluating whether and to what extent Gull sold the same product as the plaintiffs in the determination of the issue as to whether there was substantial competition between the plaintiffs and the Gull stations.

If you determine that the blend was not substantially the same product as either regular or premium gasoline, you should not take into account any sales of blend by Gull Oil Company in your determination of any issues in this matter.

INSTRUCTION NO. 17

In further regard to this definition of price discrimination, it is not enough simply that there be this discrimination or difference in price, as I have defined it. The discrimination must also be between two reasonably contemporaneous sales of the same grade

of gasoline. It is not essential that sales used for such comparison occur during the same day, week, or month. The law provides no arbitrary time limit. You may compare prices charged by the defendant during any period between the two cut-off dates for which damages are allowable in which there has been no advance or reduction in Texaco's prices. For example, one price now and a different one two months ago would likely not be comparable. One now and one last week would likely be comparable. This does not mean that the sales must have occurred on the same day or even in the same week, for you to draw this comparison, but you must find them occurring within a period of similar market conditions because a time difference might mean that different prices were caused by different market conditions rather than discriminatory

practices. As with all other issues, you alone are to make the decision on what is comparable and what is not. You are not to take my illustration as binding on you; you are the sole judges of the facts, and of what is a comparable sale.

INSTRUCTION NO. 18

There is one final point which is important in deciding whether a price discrimination which is proven may have had the necessary effect on competition. Where a seller such as Texaco extends a lower price to a buyer who resells at wholesale, there may be a price discrimination if a portion of the lower price was passed on to service station customers and that Texaco before the sale was made, knew that a portion of the difference would be passed on to the customers, and you find that the disfavored buyer was harmed

competitively by reason of the fact that a portion of the difference was passed on.

INSTRUCTION NO. 19

During the course of the trial, there have been references to certain federal statutes and regulations relating to gasoline prices and supply allocations which were in effect during part of the period of time for which the plaintiffs seek damages. This evidence has been admitted for the purpose of defining conditions which existed in the market, and you are to consider them only for this purpose. I instruct you that these statutes and regulations did not require Texaco to maintain the price difference between plaintiffs, Dompier and Gull, and did not and do not afford Texaco immunity from the Robinson-Patman Act.

INSTRUCTION NO. 20

You are instructed that if a plaintiff has proved by a preponderance of the evidence that Texaco discriminated in price in the sale of gasoline between different purchasers who were in competition with each other and that the price differential was substantial, and applied to a substantial quantity of gasoline over a substantial period of time, you may, but are not required to, infer from such facts that such price differential may have had the necessary adverse effect on competition. You are the judge of the facts and you are free to draw such inferences from the evidence before you in this case which you find from the evidence are justified.

In determining whether the price discrimination may have a substantial adverse effect on competition you may consider the following factors: the

amount and duration of the price discrimination; the identity and size of the favored purchaser; the amount of competition between him and the plaintiff; whether that competition is significant in relation to the plaintiff's competition with persons handling other brands of gasoline; and evidence of whether it was Texaco's price discrimination -- and not some other factor -- which may have caused a significant impact on competition involving the stations in substantial competition with the plaintiff, including non-Texaco stations.

With respect to Gull which purchased unbranded gasoline while the plaintiffs purchased branded gasoline, you may consider whether a lower price to Gull reflected the retail price differential and whether that price differential only measures the economic value (or consumer preference) of branded gasoline as

compared to unbranded gasoline without having a substantial adverse effect on competition.

INSTRUCTION NO. 21

As the fourth element of price discrimination, you must find that the effect of price discrimination may be substantially to lessen competition, or to injure, destroy, or prevent competition. In establishing this element, the plaintiffs are not required to establish that the discriminations in price between the plaintiffs and other purchasers in fact substantially lessened competition or in fact injured competition. It is sufficient if the plaintiffs establish by a preponderance of the evidence that the effect of the discrimination in price, if any there be, had the reasonable probability of substantially lessening competition, or

of injuring or destroying or preventing competition.

INSTRUCTION NO. 22

You are instructed that the allowance extended to certain plaintiffs for station ownership by those plaintiffs is part of the terms of the sale of gasoline and should be taken into account in determining the net buying price.

INSTRUCTION NO. 23

As to the fifth element of price discrimination, each plaintiff must show that there was substantial as opposed to minimal, competition between the plaintiff and the favored purchaser receiving a lower price at the time the lower price was received. Price discrimination between parties not in substantial competition cannot have a substantial adverse effect on competition.

In determining whether there was substantial competition between a

plaintiff and Dompier or Dompier's service station customers, or between a plaintiff and Gull, you may consider whether the plaintiff and Dompier or Dompier's retail customers, or the plaintiff and Gull were each trying to sell identical customers (i.e., were competing for the same dollar) and whether the prices charged Dompier or Dompier's service station customers or by Gull were likely to attract customers that otherwise would have purchased from that plaintiff. In determining whether that plaintiff has proven substantial competition you may consider the distance between retail service stations, traffic flow, the road patterns, the nature of the geographic area, and the extent to which the plaintiff has established that its customers were likely to buy from

Dompier or Dompier's service station customers or from Gull stations.

INSTRUCTION NO. 23(A)

In order for a non-favored and favored purchaser (or its customer) to be in competition with each other, the non-favored and the favored purchaser (or its customer) must be on the same functional level (retailer-retailer, or wholesaler-wholesaler).

You the jury, as the sole judges of the fact must determine whether Dompier and/or Gull (or their customers) were on the same functional level as the plaintiffs.

INSTRUCTION NO. 24

Each plaintiff must prove the fact of his injury, but not necessarily the amount thereof, resulting from the alleged violation with reasonable certainty. The plaintiff's injury must be substantially attributable to a parti

cular lower price granted by Texaco to Dompier or to Gull.

INSTRUCTION NO. 25

A plaintiff is required to establish with reasonable probability the existence of a causal connection between the discriminatory price and some damage to him. This element of proof is called the fact of damage. The fact of damage, like any other fact, may be proved by direct evidence, or by circumstantial evidence, or both. The plaintiffs are not confined to proof of one particular kind of injury, but may prove all types of economic damage actually resulting from the alleged discriminatory price to establish the fact of injury.

INSTRUCTION NO. 26

There is evidence that Texaco granted John Dompier Oil Company a hauling allowance. You are instructed that the hauling allowance may not be

taken into account in determining the amount of the price difference, if any, which you may find existed.

INSTRUCTION NO. 27

If you determine that Texaco has unlawfully discriminated in prices to the plaintiffs, you must then determine whether Texaco's discrimination was a proximate cause of injury to the plaintiffs' business or property.

An injury or damage is proximately caused by an act whenever if appears from the evidence in the case:

1. That the act played a substantial part in bringing about or actually causing the injury or damage; and

2. The injury or damage was either a direct result or a reasonably probable consequence of the act.

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only

one factor or thing, or of the conduct of only one person or entity. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause of injury or damage.

INSTRUCTION NO. 28

If a plaintiff proves the essential elements of his or her claim including the fact of damage by reason of Texaco's unlawful price discrimination, and Texaco has not established its affirmative defense of meeting competition, it will then be your duty to return a verdict in favor of that plaintiff and to determine the amount of damages that will reasonably and fairly compensate that plaintiff. The fact that the precise amount of a plaintiff's damages may

be difficult to ascertain should not affect recovery.

On the other hand, a plaintiff is not to be awarded purely speculative damages. While you may award damages that constitute a just and reasonable estimate of an amount on the basis of evidence, you may not award damages which rest on mere conjecture, supposition or speculation. However, it is not necessary to prove the amount of damages with precise mathematical accuracy. You are permitted to determine the amount of damages by estimate or approximation provided, of course, a reasonable basis for the estimate or approximately is shown by the evidence and the evidence reasonably establishes the probable amount of damage actually sustained.

You are not bound to reject a formula or a theory for determining damages simply because it does not

measure damages to the exact dollar and cent, and you may use any formula or theory you consider reasonable provided, however, that it must be based entirely on the evidence in the case and the law stated by the court. However, you may not determine a plaintiff's damages, if any, merely by determining the price difference between favored and disfavored buyers and multiplying that figure by the number of gallons involved, since, as I have instructed you, the measure of damage is that proximately caused by the price discrimination.

INSTRUCTION NO. 29

As I have said, if you find for a plaintiff in accordance with these instructions, it then becomes your responsibility to determine the actual damages which that plaintiff has suffered by reason of the violations of the

antitrust laws. If you find for plaintiffs, your concern is only with determining the damages separately for each plaintiff. You are not to concern yourself with the judgment to be entered by the court in the case.

INSTRUCTION NO. 30

The fact that the court has instructed you as to the proper measure of damages should not be considered as intimating any view as to which party is entitled to prevail in this case. Instructions as to the measure of damages are given for your guidance only in the event you find from the evidence in favor of the plaintiff.

INSTRUCTION NO. 31

Although twelve plaintiffs have joined together to present this case, you must consider the case of each plaintiff individually. Each plaintiff must separately establish his or her

individual right to a verdict in his or her favor.

HASBROUCK V. TEXACO
EXHIBITS
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-76-27

PLAINTIFFS'

EXHIBIT 1

March 5, 1976

Mr. Gorman C. Smith
Assistant Administrator
Office of Regulatory Programs
Federal Energy Administration
2000 M Street, N.W.
Washington, D. C. 20508

Dear Sir

On February 27th, I met with Douglas G. Robinson, Deputy General Counsel, and other FEA representatives to discuss in some detail certain trends which have arisen in our marketing of gasoline over the last several years. Mr. Robinson suggested that I reduce to writing the points we discussed and submit them to you for your information and consideration.

Over the last several years, the volume of gasoline we sell to Texaco

distributors has increased at a dramatic rate, while the volume sold to directly supplied retailers has suffered an equally dramatic decrease. For example, several Texaco distributors showed an increase of over 300% in gasoline purchases in 1975 as compared to 1972. In fact, in just one year, the average increase in the volume purchased by 28 of Texaco's largest distributors was 32% and the average increase for all distributors was over 13%. During the same period, the volume of gasoline sold to independent retailers decreased approximately 10%. This decrease was more than offset by the increase in purchases by distributors. In fact, since 1972, Texaco has experienced a 16% increase in our total adjusted base period volumes for all classes of trade.

These trends create a severe problem for us and Texaco retailers. The

economic viability of many thousands of independent retailers has been severely strained by this decrease in their gasoline sales. Moreover, Texaco is a net purchaser of gasoline and it is becoming uneconomical for us to continue to provide unlimited supplies of gasoline to all our customers.

We believe this problem can be traced to two basic factors: (1) the relative price levels to our various classes of purchasers and (2) the practice of many distributors to accept from us a hauling allowance for gasoline which is not in fact delivered to their bulk plant. While these problems may not be unique to Texaco, their impact upon Texaco is especially severe. We market not only directly to independent Texaco retailers, but also to distributors. Unlike some companies, Texaco distributors are not located in only

those geographic areas in which we do not directly supply service stations. Rather, in many areas of the country, especially urban, we sell our branded gasoline both to independent retailers and independent distributors who, in turn, resell to independent retailers. As a result, there is considerable "intra-brand" competition in Texaco gasoline.

For many years, we have sold gasoline to distributors at a discount of approximately 3 1/2¢ per gallon from the price charged our independent retailers. This discount was traditionally justified by the many important services distributors performed when they physically "distributed" this gasoline among many customers, most of whom required small volume deliveries. These traditional functions continue to be performed by most of our distributors

operating in rural areas, who serve various farm and other small volume accounts including service stations. Accordingly, their existing margin is appropriate on both a competitive and functional basis. On the other hand urban distributors have significantly changed their methods of operation over the past few years, particularly since the advent of the gasoline shortage several years ago. These distributors are shedding many of their traditional functions and have concentrated their sales in very high volume outlets. This has reduced their per gallon overhead cost to the point where a good portion of the discount is not being utilized to defray their costs of distribution at all.

In addition to this traditional discount, many of these distributors have been obtaining added savings

through the manipulation of their hauling allowance. Because our prices to distributors have traditionally been delivered prices, we are obligated to "haul" gasoline to their bulk storage facilities. Some of our large distributors own their own trucks. In those cases, they could obtain a per gallon hauling allowance based upon the ICC rate for the distance between our terminal and their bulk plant. Increasingly, however, distributors are accepting delivery at our terminal and collecting the full hauling allowance but are not taking the gasoline to their storage facility. Rather, they are transporting it only a small fraction of that distance, and delivering it direct to a retail outlet. While the amount of the hauling allowance varies with the distance to the distributor's bulk plant from our terminal facility, hauling

allowances can reach several cents per gallon. This amount can provide a significant marketing advantage to a distributor when he is not, in fact, incurring the cost of hauling the gasoline to his bulk facility.

We believe that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance. We believe that they are inconsistent with the realities of gasoline marketing today.

Very truly yours,
J. W. Kinnear

JWK:llw
cc: Mr. Douglas G. Robinson
bcc: WMF
FIB

PLAINTIFFS'

EXHIBIT 2

T E X A C O

New York, N. Y., March 8, 1976

REGIONAL MANAGERS MEETING
MARCH 2 AND 3, 1976
DISTRIBUTOR VOLUME SITUATION
2.03

MEMORANDUM TO THE FILE

On March 2nd and 3rd a Regional Managers Meeting was held with the Executive Staff to discuss the very serious problem of rampant and alarming increases in distributor gasoline volume.

It was made clear that our main concern is with the profitability aspects of this trend, our ability to continue to supply this kind of volume, and the sales imbalance that is developing among the various classes of trade.

To emphasize the seriousness and concern of this matter, the following distributor gasoline volume data was presented.

ADJUSTED BASE GASOLINE VOLUME DATA

Class of Trade	1972 Vol. (Bbls.)	Adjusted Base 1975 Vol. (Bbls.)	% Increase
Distributor	52,756,000	70,658,000	34%
C.O./3rd Pty	77,271,000	79,566,000	3%
Other Resale	43,933,000	49,900,000	13.4%

Note: Total Adjusted Base for Marketing-U.S. is 16% over 1972 average for all classes of trade.

1975 ACTUAL PURCHASES

	1975 Volume (Bbls.)	% of Adjusted Base
Distributor	67,023,000	96.3%
C.O./3rd Pty	68,835,000	80.2%
Other Resale	45,286,000	90.6%

Note: Distributor class of trade gasoline volume has increased 27% 1975 versus 1972.

PHASE I

A. The attached legally approved letter, which explains our concern over this matter, is to be mailed to all distributors by Division Managers. The program is to be personally discussed immediately with Division Managers by Regional Managers and the letter mailed to all distributors, personally signed by the Division Managers, no later than March 8, 1976.

B. Regional Managers are to make personal calls on selected distributors which are considered to be the worst offenders of the program.

PHASE II

A. Expedite implementation of the new wholesale franchise agreement with a minimum-maximum clause and providing for a 5-year agreement. It was the consensus that a 5-year agreement was

desirable because of the following reasons:

1. A continued, stable source of supply is uppermost in the minds of our distributors, particularly in the event of allocation and price decontrol.

2. The 5-year agreement would allow the distributor and Texaco to plan their long-range marketing strategy and protect pay-out on investments.

3. The extended term agreement would promote the acceptance of the minimum-maximum provision.

B. It was further agreed that the 5-year agreement would not be offered to those distributors which we have formally cancelled but continue to supply under directive of the FEA, nor would it be offered to those distributors who have a current S-141 agreement and whose business relationship we do not wish to continue in the future. The new

agreement will be offered to all other distributors immediately, and it was the consensus that approximately 80% would execute mutual cancellations of their present S-141 contracts and sign the new agreements.

PHASE III

There followed an extensive discussion on the merits and necessity of increasing distributor prices in the event Phase I and Phase II above were not successful in stemming the large volume purchases of distributors. It was agreed we should increase distributor prices, if necessary, within the next 4 to 5 months, as follows:

1. Except for the Los Angeles Basin and certain markets in the Western Region, increase distributor prices nationwide by $.005 per gallon, which will reduce distributor margin to $.0325.

2. In the Los Angeles Basin, increase distributor prices by $.004 per gallon, which will reduce their margin to $.030 and with the TVA of $.0025 will place their margin at $0.325, equal to all other distributors.

There followed a discussion on consignee conversions and the merits of eliminating the consignee class of trade entirely and having only a distributor class of trade. It was the consensus that an adequately formulated plan to accomplish this objective could take approximately three years and that the plan must be structured to provide provisions for financing and a consolidation program, because of the following reasons:

1. Some consignees are very poor businessmen and will need some kind of assistance in the conversion.

2. Small volume consignees could not remain consignees and survive in the marketplace in competition with distributors.

3. Some consignees do not have the financial wherewithal to assume the liability of converting to distributors.

4. Some consignees will be reluctant to convert for several reasons, and we cannot force the conversion due to present FEA regulations.

* * * consignees who have been with Texaco for many years * * * simply will not be willing to assume the * * * responsibility of converting to distributor.

* * * on the above, it was the consensus that we * * * the consignee class of trade, and Mr. D. A. * * * Mr. T. B. Meadows to investigate and iden- * * * considerations necessary to

expedite consignee * * * on a high priority basis, which will include a * * * consolidation and financing.

* * * D. A. Doherty also suggested that we should * * * structuring and redefining of our entire wholesale * * * system in the long range.

/B. W. Castleberry

B. W. CASTLEBERRY

Staff

Managers

(Individually Addressed to Distributors)

Texaco Distributors have traditionally played an important role in our Company's distribution system; however, because many Texaco Distributors have dramatically increased their volume of sales over the past several years, and particularly over the past several months, we are concerned about our ability to supply this large volume of product and we are concerned about

whether these Texaco wholesalers are supporting these sales with the type of wholesaler services that further the general acceptance of the Texaco brand.

During each month that we have supplied an unlimited allocation of product, we have advised you that such unlimited quantities were only being made available for that particular month. We wish to make it clear to you again so that you are not misled into taking on or keeping present volumes on the erroneous assumption that we will necessarily meet those needs in the future.

If you have any questions regarding this matter, we will be happy to discuss it further with you.

(Division Manager)

PLAINTIFFS'

EXHIBIT 11

T E X A C O

Portland, Oregon, February 22, 1972

1972 WHOLESALE MARKETING PLAN

DISTRICT SALES MANAGERS

PORTLAND REGION

In order to insure achievement of all 1972 objectives, including Wholesale Product Sales (see attached), we must:

1. Acquire new business.
2. Improve Sales through existing wholesalers.

The plans and programs listed below will enable us to equal or exceed these objectives.

1. G.R.O.W. (Generate Results - Obtain Wholesalers)

The program is designed to determine where new wholesale distribution is desired, then solicit and secure the Wholesaler. The continuation of the

GROW program will help to improve our share of market in rural areas and assure representation where presently we have none.

2. FILL THE GAP PROGRAM

Wholesalers will be encouraged and motivated, through the District, to select and develop prime sites, thereby improving retail representation; volume and profit. Instructions have previously been issued.

3. M.A.P.F.P. - Market Analysis Plan for Progress

Analyze or update each Wholesaler area on or before June 30, 1972.

After completion, the Supervisor and District Manager will be better able to establish realistic projects all classes of trade, including plans to achieve them and make recommendations for:

1. New Investment Service Stations
2. Rehabilitation

3. Solicitation and Retail, Consumer and Farm accounts.
4. Evaluate and Rate Wholesaler.
5. Continuing present method of Wholesale operation.
6. Consolidation with adjacent Wholesaler.
7. Conversion to Salary.

4. WHOLESALER SUPERVISED THRUPUT

Present program is to continue with Consignee recording sales volume each investment account immediately after the last day of the month, thereby bringing to his attention the need for corrective action, if that be the case.

5. CO-OP ADVERTISING

Districts have been given budgets in the amounts requested.

6. WHOLESALER G.L.I.T.T.E.R.

Continued emphasis will be placed on upgrading our Wholesalers' image and operations, including grounds, lines,

inventory, tanks, trucks, employes and retail service stations.

a. BULK PLANTS

Prior to April 1, 1972, bulk plant facilities are to be carefully inspected by the District Sales Supervisor, who will be required to complete Section 5, pages 4 and 5, Form S-283, submitting one copy to Assistant Regional Manager, Wholesale.

Necessary repairs and painting are to be scheduled, budget permitting.

Districts will continue to be motivated to maintain neat and clean offices, well arranged warehouses and weed-free yards.

b. ROLLING EQUIPMENT

Renewed emphasis will be placed on present program to establish desired prestige standards.

Painting and proper identification, all Wholesaler trucks, will be accelerated, with June 30, 1972, the target date for completion.

b. Rolling Equipment (Contd)

Colored photos, side and rear views, are to be forwarded within 30 days after completion of painting and identification.

Rolling equipment is to project the Sparkle image at all times.

c. RETAIL SERVICE STATIONS

"The Tiffany Image" is desired at all Wholesaler served and supervised service stations.

The Sales Supervisor is to make a thorough inspection at each unit prior to May 1, 1972, utilizing the S-396R, submitting a copy of the report to Assistant Regional Manager, Wholesale.

The Wholesaler and his employes are to be encouraged to prepare S-396C during each visit to retail accounts.

Special emphasis is to be placed on clean and well equipped rest rooms.

7. ELIMINATE PAST DUE RECEIVABLES

Close liason with the Credit Department will be maintained and necessary attention to problem accounts will be given during field visits.

8. WHOLESALER RELATIONS

Improve Wholesaler profitability and relations through better understanding and communications.

Wholesalers are to be offered a two-day seminar on Management and Merchandising. Also, the conference Professional Selling Techniques, will be scheduled during 1972.

The training program will result in improved sales, accounting and management practices, and will help to eliminate unexplained and excessive shortages and unsatisfactory audits.

8. Wholesaler Relations (Contd)

Districts will continue periodic Wholesaler meetings to provide continued good communications, understanding and stimulus, and we in Wholesale will spend more time in the field assisting District personnel.

For your ready reference we are attaching a list of Wholesalers, indicating gasoline sales for 1971 versus 1970, together with 1971 monthly average gasoline gallonage for each Wholesaler.

Shortly, we will mail to you for distribution to your Supervisors, Wholesaler Data Sheets, covering gasoline, middle distillates, auto oils, industrial oils and grease. The form is

designed so a monthly sales comparison, current year versus previous year, can easily be made. Other pertinent data also will be included. Sales figures for 1970 and 1971 have been posted. Upon receipt, the data sheets for the current year should be posted on a monthly basis, thereby alerting the Supervisor where his help and guidance is needed.

We are vitally interested in Wholesaler progress, and are determined to help in every way possible, so we will be reviewing your Wholesaler Data Sheets on every visit. Please keep them current.

We are confident the above plans and programs, coupled with your desire to excel, will result in an outstanding 1972 Wholesale sales year.

/O. W. Miller
O. W. MILLER

CHK:rdm
DAS (LA)
JLA (NY)
CAR
JMS
ASST. DIST. MANAGERS
Attach.

PLAINTIFFS'

EXHIBIT 12

T E X A C O

Portland, Oregon, January 4, 1972

1972 WHOLESALE OBJECTIVES

7.44

Messrs:
L. W. Lefler - Anchorage
J. K. Sullivan - Boise
T. L. Carey - Spokane
R. W. Daniels - Medford
C. B. Barningham - Butte
D. G. Wallace - Portland
J. E. Tomlin - Seattle

Here are your District objectives for 1972. Please place the necessary emphasis on them in order that these objectives are attained at the earliest possible date.

1. Exceed all Sales Department product goals.
2. Each District to secure one good representative new Wholesaler.
3. Analyze or up-date each Wholesaler Market Analysis by June 30, 1972.

4. Secure new Fill The Gap service stations.

Alaska	- 1	Butte	- 3
Boise	- 3	Portland	- 2
Spokane	- 3	Seattle	- 2
Medford	- 2		

5. Rehabilitate and modernize all obsolete service stations.
6. Properly paint and identify all truck equipment.
7. Eliminate all past due receivables.
8. Improve Consignee audits to a point where they are 100 percent satisfactory.
9. Utilize mutual understanding approach with Wholesalers.

I am confident you will agree the objectives are reasonable and that we can depend upon you to stimulate all concerned to get the job done.

/C. A. Reisdorf
C. A. REISDORF

OWM:rdm
DAS (LA)
JLA

PLAINTIFFS'

EXHIBIT 14

TEXACORG PTL

LAST

[Spokane Dist. #3 Stamp
dated SEP 1972]

TEXACO SPK

[Pls list the location of
every station Dompier
has requested assistance
on during 1972.]

TJC

T L CAREY

9-15-72

ON AUG 29, 1972, I REQUESTED YOU & L T BOLLINGER VISIT EACH RETAIL ACCOUNT DOMPIER SERVES AS REFLECTED ON FORMS S-21 (DM).

MAY WE HAVE YOUR REPLY CONCERNING INVESTIGATION WITHOUT FURTHER DELAY.

[Address]

1. E. 303 - 3rd Avenue
[okay]

2. N. 3302 Monroe [okay]

O W MILLER 3. N. 7902 Division [okay]

4. Route 1, Mead [okay]

5. R & E. Inc., Route #4,

TEXACORG PTL Spokane [okay]

6. N. 2725 Division [okay]

7. E. 7802 Sprague [okay]

8. N. 930 Division [okay]

9. N. 2924 Market [okay]

10. Wall & Rowan [(?)]

[Verified 9-19-72

T. L. Carey]

T E X A C O

Spokane September 19, 1972

DISTRIBUTOR ACCOUNTS

JOHN DOMPIER OIL CO.

7.41-5

4.21-2

Mr. O. W. Miller

Portland

On September 19, 1972, I personally verified each account served by Dompier Oil Company as reflected on their Forms S-21(DM).

All their stations are identified as Texaco outlets. All pumps are painted and identified as dispensing either Fire Chief or Sky Chief gasoline.

/T. L. Carey
T. L. CAREY

TLC:rlo'c

PLAINTIFFS'

EXHIBIT 23

T E X A C O

Portland, Oregon April 24, 1972

WHOLESALER RELATIONS

7.31

PORTLAND REGION

DISTRICT SALES MANAGERS

DISTRICT SALES SUPERVISORS

The following is being furnished to you and your people to help improve sales performance and increase the efficiency and effectiveness of all those handling wholesale business.

While this letter has been directed to all District personnel handling wholesalers, the guide lines are especially important to the new Sales Supervisors and therefore, we ask that he quickly become acquainted with the contents, including all agreements, modifications and circular letters.

Each supervisor should secure sample copies of contracts or agreements applicable to Consignees, Distributors, Peddlers and Tank Truck Dealers. These contracts and agreements together with all modifications and/or amendments should be studied thoroughly, so that a complete understanding of the responsibilities and obligations of the parties involved is obtained.

As an example, we list the following contracts and/or agreements:

CONSIGNEES:

Forms S-82 Consignment Agreement

Forms S-82A Schedule A.

Forms S-141E Distributor Agreement
(covering Consignees who are distributors on Middle Distillates)

Also, all modifications or amendments to the above, such as:

S-368 - Agreement

S-368B - Direct Delivery

S-368C - Higher Commissions

S-368D - Reduced Commissions

S-368E - Rental Authorization

S-368F - T/C, T&T, or C/L

S-368G - Drayage

S-368H - Farm & Consumer Modification

TANK TRUCK DEALERS

Form S-83 - Tank Truck Dealer Agreement (also, modifications or amendments thereto).

Form S-207 - Agreement of Sale (covering Tank Truck Dealers who are Distributors on Middle Distillates.)

DISTRIBUTORS:

Form S-141 - Distributor Agreement

PEDDLERS:

Form S-207 - Agreement of Sale

You should also secure copies of the following Circular Letters which must be studied in order to gain complete understanding of the Company's policy effecting the various Wholesalers listed above:

146	261H	265	269A	292A	296C
164	262C	266	270	293	709B
169	263B	267B	275	294	816B
260D	264A	268A	290A	295A	

While other circulars affect our dealings with Wholesalers, the above listed ones are most important.

Each supervisor should have a neat, adequate briefcase with individual files set up for each Wholesaler along with a general file covering current programs and matters of general nature.

It is extremely important that route sheets be prepared and forwarded to Wholesalers at least one week in advance of scheduled calls so that the

Wholesaler may schedule his undivided time with the Supervisor during each visit.

Prior to actual call, prepare an outline of your work plans and exactly what is to be accomplished on this call. Arrival at the bulk plant should be punctual, at least 15 minutes prior to opening hours. You should immediately let the Wholesaler know you will spend the full day with him.

Review sales results to date as reflected by Forms S-222 and get an expression of Wholesaler attitude on sales plans and future results.

Remember, we must always sell and encourage our Wholesalers to handle the complete line including TBA, Quality Line and Green Chief.

At this time, you should cover all detail matters and current programs from the personal and general briefcase

files. Establish completion dates on any items requiring action.

Review Forms S-548, (all BSLA) S-229, and S-210, gauge storage tanks and cut off Forms S-184. Investigate excessive net 60° shortages and take corrective action.

All of the above matters should be covered quickly and with definite decisions made of current matters.

A thorough inspection of the physical condition of the bulk plant and all facilities should be made, such as housekeeping, truck painting and identification, employee appearance and uniforms, with notes made of any items requiring maintenance or repairs.

Remember, it is vitally important that you spend as much time as possible in the field with the Wholesaler. Accordingly, the above should not exceed approximately two hours.

With the Wholesaler, you should now spend the remainder of the day determining his plans for expanding sales volume through the acquisition and/or conversion of competitive resellers and consumers. You should investigate the possibility of retail service station development through first-party leasses, assisting the Wholesaler in selecting desirable sites.

It is extremely important for supervisors to determine prospective competitive accounts which the Wholesaler is presently soliciting. He should render any possible assistance by accompanying the Wholesaler on actual sales calls, assisting in the solicitation.

Each Retailer and large consumer account presently handling Texaco products should be visited with the Wholesaler in order to assist him in

further sales solicitation and merchandising activities.

Overnight stays in Wholesaler areas at reasonable intervals should be scheduled in order to determine service station hours, lighting and night operations.

Of vital importance is the necessity for our supervisors to become acquainted with competitive wholesalers and large, successful Retailers in each wholesale area. They should also become acquainted with local businessmen in order to keep abrest of local situations and to develop a prospective list of Retailer and Wholesaler replacements.

Last but certainly not least, decisions should be made on the spot if at all possible, covering any matters brought to the supervisor's attention by the Wholesaler. If this is not within the supervisor's authority, matters

should be expedited promptly upon his return to the office and the Wholesaler advised without delay.

We do not intend to convey the impression that the above outline is all-inclusive. I am sure it can and will be improved upon materially; however, it will serve as a basis for our supervisors to achieve a high degree of effectiveness if followed.

We will, of course, appreciate any comments or suggestions you may have from time to time for improving this scheduled outline of activity.

/O. W. Miller
O. W. MILLER

OWM:ekd
DAS (LA)
JLA (NY)
EX & GEN STAFF

PLAINTIFFS'

EXHIBIT 41

T E X A C O

March 8, 1976

John Dompier Oil Co.
N. 407 Madelia
Spokane, Washington 99202

Gentlemen:

Texaco distributors have traditionally played an important role in our company's distribution system; however, because many Texaco distributors have dramatically increased their volume of sales over the past several years, and particularly over the past several months, we are concerned about our ability to supply this large volume of product, and we are concerned about whether these Texaco wholesalers are supporting these sales with the type of wholesaler services that further the general acceptance of the Texaco brand.

During each month that we have supplied an unlimited allocation of product, we have advised you that such unlimited quantities were only being made available for that particular month. We wish to make it clear to you again so that you are not mislead into taking on or keeping present volumes on the erroneous assumption that we will necessarily meet those needs in the future.

If you have any questions regarding this matter, we will be happy to discuss it further with you.

Yours very truly,

W. E. NUNNENKAMP

Division Marketing Manager

WEN-RM

bcc: FHS

PLAINTIFFS'

EXHIBIT 98

7-23-73

O W MILLER

PTLD

FILE

CAPACITY OF TANK STORAGE BY PRODUCT JOHN DOMPIER BULK PLANT AS FOLLOWS:

7-41-5

1 -	10,000 GAL	FIRE CHIEF
1 -	6,000 "	SKY CHIEF
2 -	10,000 "	DIESEL #2
1 -	6,000 "	STOVE OIL

L T BOLLINGER

FORM S-21 PLAINTIFFS'

DR 4-66 EXHIBIT 134

63-624-023401

APPLICATION FOR ALLOWANCE BASED ON PUMP METER READINGS

No. 04934

Spokane 11-30-72

PRICE ADJUSTMENT

63275JAN251973

Below is a record of the volume of sales of Texaco Sky Chief and/or Fire Chief * * * , based on pump meter readings from each dealer supported by copies attached of forms signed by each dealer, on which /__/ I /__/ we request allowance * * *

			DATE		GALLONS	
DEALER NAME AND TOWN			START	END	SKY	FIRE
Zone						
1	Francis Maerk	Spokane	11-17	11-21	933	2103
	x	x	11-21	11-28	1656	4505
* * *	Texaco Ser	Spokane	11-17	11-21	906	2295
	x	x	11-21	11-25	1374	4975
* * *	Wittrock	Spokane	11-17	11-21	115	560
* * *	x x	x	11-21	11-25	215	1440
* * *	"T" Bird Service	Spokane	11-17	11-30	3021	4408
* * *	Gary Evans	Spokane	11-17	11-30	7592	18636
6	Texaco Car Wash#2	Spokane	11-17	11-30	14662	25527

15	Texaco Gas Market Spokane	11-17	11-30	27748	57251
17	Red Carpet Car Wash #2 x	11-17	11-30	5285	8854
7	Red Carpet Car Wash #1 x	11-17	11-30	6583	9253
	TOTAL (Each Product)			70090	139810

DEALER NAME AND TOWN			RATE	ALLOWANCE SKY	ALLOWANCE FIRE
Zone					
1	Francis Maerk	Spokane	$ 0052	4.85	10.94
	x	x	0052	8.61	23.43
* * *	Texaco Ser	Spokane	0052	4.71	11.95
	x	x	0052	7.14	25.87

* * *	Wittrock	Spokane	0052	.60	2.91
* * *	x x	x	0052	1.12	7.49
* * *	"T" Bird Service	Spokane	0052	15.71	22.92
* * *	Gary Evans	Spokane	0052	39.48	96.91
6	Texaco Car Wash#2	Spokane	0052	76.24	132.74
15	Texaco Gas Market	Spokane	0052	144.29	297.71
17	Red Carpet Car Wash #2 x		0052	27.48	46.04
7	Red Carpet Car Wash #1 x		0052	34.23	48.12
	TOTAL (Each Product)			364.46	727.03
	Sky Chief Allowance Requested				364.46
	Total Allowance Requested				1091.49

I /__/ We /XX/ certify that the information shown above is true and correct and represents sales made by the dealers listed from Texaco products delivered to them by me /__/ us /XX/. I /__/ We /XX/ agree to maintain my /__/ our /XX/ record of deliveries of Texaco products to such dealers and of their pump meter readings. I /__/ We /XX/ further agree to permit a representative of Texaco Inc. to inspect such records and/or pump meter readings at any time during reasonable business hours in order to verify the gallonage upon which I /__/ We /XX/ request assistance. I /__/ We /XX/ further agree to refund to Texaco Inc. the amount of any allowance granted to me

/__/ us /XX/ as a result of any errors or inaccuracies.

/__/ MAIL CHECK /XX/ APPLY TO ACCOUNT JOHN DOMPIER OIL CO.

N. 407 Madelia St.

Spokane, Wash.

/J.K. Dompier

I certify the information shown herein conforms to that furnished on supporting Forms S-21 (DM) and that "Rate of Allowance" specified was in effect on and between "Start" and "End" dates of Pump Meter Readings. To the best of my knowledge and belief, this

request is a proper one, and, accordingly, I

recommend approval.

/T. L. Carey   12-31-72

District * * *   Date

APPROVED:

/P. Mark FW   1-5-73

* * *   Date

0 526

12-12-72

Zone 6

MEMORANDUM - GENERAL ALLOWANCE
METER READING REPORT

Texaco Car Wash #2
Sav-All Gas Inc.
N.

Period of Report
Started 11-17-72   Ended 11-30-72

PUMP METER READINGS

Sky Chief Pump No.	Start	End	Fire Chief Pump No.	Start	End
1			1	84371	96793
2	96337	3443	2		
3	41495	49051	3		
4			4	26945	40050
5			5		
6			6		
Totals	137832	52494	Totals	111316	136843
Adj.		100000	Adj.		
Adj. End Total		152494	Adj. End Total		136843
Less		137832	Less		111316
Net Sales-Gallons		14662	Net Sales-Gallons		25527

I certify the above meter readings to be true and correct and agree to promptly refund to seller the amount of allowance given as a result of errors in this report.

/Ray Koziuk

(Signature of Dealer)

The above total credit was applied to Invoice No. 74603 dated 12-12 1972

By: /J.K. Dompier

Representing

0 535

11-30-72

Zone 15

MEMORANDUM - GENERAL ALLOWANCE
METER READING REPORT

Texaco Gas Market
N. 2924 Market, Spokane, Wash.

Period of Report

Started	Ended
11-11-72	11-30-72

PUMP METER READINGS

Sky Chief			Fire Chief		
Pump No.	Start	End	Pump No.	Start	End
1			1	23088	40881
2	95746	2620	2		
3			3	67330	83819
4	54766	63769	4		
5			5	13260	36229
6	21057	32928	6		
Totals	171569	99317	Totals	103678	160929
Adj.		100000	Adj.		
Adj. End Total		199317	Adj. End Total		160929
Less		171569	Less		103678
Net Sales-Gallons		27748	Net Sales-Gallons		57251

I certify the above meter readings to be true and correct and agree to promptly refund to seller the amount of allowance given as a result of errors in this report.

/R.W. Harder

(Signature of Dealer)

The above total credit was applied to Invoice No. 74723 dated 12-16 1972

By: /J.K. Dompier

Representing

0 536

11-30-72

Zone 17

MEMORANDUM - GENERAL ALLOWANCE
METER READING REPORT

Red Carpet Car Wash #2
E. 7208 Sprague Ave.
Spokane, Wash.

Period of Report
Started 11-17-72 Ended 11-30-72

PUMP METER READINGS

Sky Chief			Fire Chief		
Pump No.	Start	End	Pump No.	Start	End
1	99193	3509	1		
2			2	54056	58510
3			3	90564	92917
4	67397	68366	4		
5			5	58662	60709
6			6		
Totals	166590	71875	Totals	203282	212136
Adj.		100000	Adj.		
Adj. End Total		171875	Adj. End Total		212136
Less		166590	Less		203282
Net Sales-Gallons		5285	Net Sales-Gallons		8854

I certify the above meter readings to be true and correct and agree to promptly refund to seller the amount of allowance given as a result of errors in this report.

/J.K. Dompier

(Signature of Dealer)

The above total credit was applied to Invoice No. 74724 dated 12-16 1972

By: /J.K. Dompier

Representing

0 537

11-30-72

Zone 7

MEMORANDUM - GENERAL ALLOWANCE
METER READING REPORT

Red Carpet Car Wash #1
N. 2725 Division
Spokane, Wash.

Period of Report
Started 11-17-72
Ended 11-30-72

PUMP METER READINGS

Sky Chief Pump No.	Start	End	Fire Chief Pump No.	Start	End
1	16851	20244	1		
2			2	22699	26146
3	63310	65784	3		
4			4	20477	24961
5			5	23726	25048
6	5559	6275	6		
Totals	85720	92303	Totals	66902	76155
Adj.			Adj.		
Adj. End Total		92303	Adj. End Total		76155
Less		85720	Less		66902
Net Sales-Gallons		6583	Net Sales-Gallons		9253

I certify the above meter readings to be true and correct and agree to promptly refund to seller the amount of allowance given as a result of errors in this report.	The above total credit was applied to Invoice No. 74725 dated 12-16 1972
/J.K. Dompier	By: /J.K. Dompier
(Signature of Dealer)	Representing

0 538

63-624-003401

APPLICATION FOR ALLOWANCE BASED ON PUMP METER READINGS

No. 04936

Spokane, Wash. 12-31-72

PRICE ADJUSTMENT

Below is a record of the volume of sales of Texaco Sky Chief and/or * * * , based on pump meter readings from each dealer supported by copies attached of forms signed by each dealer, on which /__/ I /XX/ we request * * * below:

DEALER NAME AND TOWN		DATE START	DATE END	GALLONS SKY	GALLONS FIRE
Zone					
15 Texaco Gas Market	Spokane	12-1	12-12	27752	51021
x		12-12	12-31	44318	91808
2 Gary Evans	Spokane	12-1	12-31	19883	40611
6 Texaco Car Wash #2	Spokane	12-1	12-20	19957	35917
x		12-20	12-31	12339	23691
TOTAL (Each Product)				124249	243048

DEALER NAME AND TOWN		RATE	ALLOWANCE SKY	ALLOWANCE FIRE
Zone				
15 Texaco Gas Market	Spokane	0052	144.31	265.31
x		0087	385.57	798.73
2 Gary Evans	Spokane	0052	103.39	211.18
6 Texaco Car Wash #2	Spokane	0052	103.78	186.77
x		0087	107.35	206.11
TOTAL (Each Product)			844.40	1668.18
Sky Chief Allowance Requested				844.40
Total Allowance Requested				2512.58

I /__/ We /XX/ certify that the information shown above is true and correct and represents sales made by the dealers listed from Texaco products delivered to them by me /__/ us /XX/. I /__/ We /__/ agree to maintain my /__/ our /XX/ record of deliveries of Texaco products to such dealers and of their pump meter readings. I /__/ We /XX/ further agree to permit a representative of Texaco Inc. to inspect such records and/or pump meter readings at any time during reasonable business hours in order to verify the gallonage upon which I /__/ We /XX/ request assistance. I /__/ We /XX/ further agree to refund to Texaco Inc. the amount of

any allowance granted to me /__/ us /XX/ as a result of any errors or inaccuracies.

/__/ MAIL CHECK /XX/ APPLY TO ACCOUNT JOHN DOMPIER OIL CO.

N. 407 Madelia St.

Spokane, Wash.

/J.K. Dompier

I certify the information shown herein conforms to that furnished on supporting Forms S-21 (DM) and that "Rate of Allowance" specified was in effect on and between "Start" and "End" dates of Pump Meter Readings. To

the best of my knowledge and belief, this request is a proper one, and, accordingly, I recommend approval.

/T. L. Carey	1-18-73
District * * *	Date

APPROVED:

/R. Ward	1-22-73	
* * *	Date	0 539

12-31-72

Zone 6

MEMORANDUM - GENERAL ALLOWANCE
METER READING REPORT

Texaco Car Wash #2
Sav All Gas, Inc.
N. 3306 Monroe, Spokane, Wash.

Period of Report

Started	Ended
12-1-72	12-20-72

PUMP METER READINGS

Sky Chief: Pump No.	Start	End	Fire Chief: Pump No.	Start	End
1			1	96793	14863
2	3443	12372	2		
3	49051	60079	3	40050	57897
4			4		
5			5		
6			6		
Totals	52494	72451	Totals	136843	72760
Adj.			Adj.		100000
Adj. End Total		72451	Adj. End Total		172760
Less		52494	Less		136843
Net Sales-Gallons		19957	Net Sales-Gallons		35917

I certify the above meter readings to be true and correct and agree to promptly refund to seller the amount of allowance given as a result of errors in this report.	The above total credit was applied to Invoice No. 74699 dated 12-30 1972
/Ray Koziuk	By: /J.K. Dompier
(Signature of Dealer)	Representing

0 543

12-30-72

Zone 6

MEMORANDUM - GENERAL ALLOWANCE
METER READING REPORT

Texaco Car Wash #2
Sav All Gas, Inc.
N. 3306 Monroe, Spokane, Wash.

Period of Report
Started 12-20-72 Ended 12-31-72

PUMP METER READINGS

Sky Chief Pump No.	Start	End	Fire Chief Pump No.	Start	End
1			1	14863	26733
2	12372	17961	2		
3	60079	66829	3		
4			4	57897	69718
5			5		
6			6		
Totals	72451	84790	Totals	72760	96451
Adj.			Adj.		
Adj. End Total		84790	Adj. End Total		96451
Less		72451	Less		72760
Net Sales-Gallons		12339	Net Sales-Gallons		23691

I certify the above meter readings to be true and correct and agree to promptly refund to seller the amount of allowance given as a result of errors in this report.

/Ray Koziuk
(Signature of Dealer)

The above total credit was applied to Invoice No. 74699 dated 12-30 1972

By: /J.K. Dompier

Representing

0 544

PLAINTIFFS'

EXHIBIT 202

T E X A C O

L O N G   R A N G E   P L A N

1977-1981

MARKETING DEPT.--U.S.

* * *

MARKETING DEPARTMENT-U.S.
LONG RANGE PLAN
5 YEARS 1977 - 1981

SALES OBJECTIVES - AVAILS

Sales objectives for gasoline, middle distillates and residual fuel oils will be determined annually on the basis of avails. Exhibit I attached is a forecast of the avails for each of the product categories through the year 1981.

These forecasts are based on Texaco's equity manufacturing system plus firm processing arrangements and move toward minimizing of "outside" product purchase and product imports.

Exhibits Ia and Ib show areas of growing market potential for middle distillates and residual fuel oils.

Exhibit II is a comparison of Texaco with other major competitors showing sales versus equity refining capacity. It indicates the necessity in future years for Texaco to relate its sales objectives on gasoline and middle distillates to be balanced more closely with equity avails; it follows that marketing should concentrate in areas preferential to equity refinery sources in order to be competitive in product supply <u>and</u> <u>distribution</u> <u>cost</u>.

The sales objectives on other products will be determined annually by sales management.

<u>EXHIBIT VI (cont'd.)</u>
<u>MARKETING DEPARTMENT-U.S.</u>
LONG RANGE PLAN
5 YEARS 1977 - 1981

* * *

II. <u>THE MARKETING PROBLEM</u>

The problem facing Texaco, other major oil companies and some non-major integrated marketers is the competitive pressure on margins and profits in the traditional Class-Of-Trade marketing structure, i.e., Wholesalers, Retailers and Consumers. Competitive pump prices will no longer support both the wholesaler margin and a viable retailer profit on gasoline.

The narrowing rack to pump price differential is causing numerous changes in marketing practices by the Wholesale and Retail Classes of Trade.

<u>WHOLESALERS</u> are adding Salary Retail Operation to their function and melding the retail profit with their wholesale margin in order to post a pump price

competitive with Independents, Private Branders and other Major Wholesalers also marketing as retailers. This retailing is often on a self-serve basis.

Wholesalers are also placing retailers on a commission basis, particularly in self-serve locations and frequently developing convenience store self-serve outlets eliminating all manpower expense in gasoline sales. This can result in a pump pride as low as 3¢ to 4.5¢ above the wholesalers' buying price and often as low as the competitive independents' pump price.

Some wholesalers are selling retailers at significant discounts to assist them in being competitive at the pump and maintaining volume often taking the hauling allowance and little more as their wholesale profit.

<u>RETAILERS</u>, buying at Dealer Tankwagon Price, are facing this rack to

pump competition with increasing difficulty. This is a very real problem for Lessee Retailers who may also be paying a gallonage rental for their station and which, from their viewpoint, increases the buying price by that amount, usually 1.5¢ to 2¢.

Retailers have attempted various solutions:

1. Lowered their pump price, absorbing the loss in profit down to 4¢ or 5¢ above their D.T.W. cost.

This is still 8¢ to 9¢ above the wholesalers' buying price and they are 4¢ to 5¢ above the street pump postings.

2. Retailers have moved in significant numbers to split-island self-serve operation with some volume improvement, but still not being sufficiently competitive to maintain sales in the long term.

3. Some retailers have gone completely self-serve but, here again, they can be competitive only to a degree.

4. Many retailers, including most Lessee Retailers, have continued to post prices reflecting their traditional profit resulting in a drop in sales. This is the principle cause of the decline in thruput in stations operated by Texaco Lessee Retailers. Apparently this is true of other major company lessee retailers also.

Why Rack Pricing?

The concept of Rack Pricing for major oil companies could be one solution to the volume and profit decline of the retailer class of trade.

It is actually a reduction from the present D.T.W. buying price to a price level related to the commodity value of gasoline in a free competitive market; or, it could be viewed as an increase in

the wholesaler buying price (reduction in margin) relative to the retailer buying price.

A Branded supplier could post rack prices above unbranded rack postings if the marketing value of the Brand is strong and can demonstrate a "performance" value in the free marketplace.

III. HISTORIC AND CURRENT TRENDS

Historically, many independent refiners and some secondary majors, such as Ashland, have used "rack" or "dock" pricing as it suited their marketing methods.

Marathon uses a combination of "rack" and "functional" pricing in that they price differently for various types of buyers at the dock, such as:

Unbranded and Non-contract

Unbranded contract

Branded Non-Stocking

Branded with Bulk Plant Storage

The trend with majors is generally dated from 1971 when "rack" pricing was introduced for Branded Distributors by Citgo in North Carolina and by Continental in the Rio Grande Valley in Texas. The announced intent at that time, by these Companies, was to find an alternate method of pricing distributors to eliminate the substantial allowances common in the Industry because of depressed retail prices.

* * *

PLAINTIFFS'

EXHIBIT 215

Spokane August 5, 1975

ALLOCATION PROGRAM

JOHN DOMPIER OIL

6.20

Mr. R. E. Bauman

Spokane

In response to your request for my recommendation relative to: (1) increased allocation for above account; (2) proposed supply of Mission and Magnolia station; and (3) general trend concerning method of marketing and growth pattern of above account in relation to general marketing of Texaco products in Spokane, the following brief synopsis of marketing in Spokane since my assignment is submitted:

John Dompier Oil Company became a Texaco Distributor in Spokane in 1961. My assignment to District Sales

Supervisor in Spokane became effective January, 1970. At that time Mr. Dompier supplied six retail accounts averaging a total of 155,152 gallons per month. 242 Spokane supplied 27 investment accounts averaging 21,084 gallons each, and Carl Schreck supplied four contract retail accounts averaging 25,365 gallons each. Of Dompier's six accounts, two were wholly owned Dompier car wash outlets.

In 1971 Mr. Dompier began negotiations to supply and brand to Texaco several selected "Big West" retail outlets. At this time Spokane District Management approved Mr. Dompier supplying these accounts; however, I insisted that I personally inspect the proposed locations and counsel with Dompier as to acceptability of this representation according to Texaco standards. Mr. Dompier subsequently turned down supply to

three proposed accounts, and served one remaining account.

From 1971 to date, as District Sales Supervisor, I have continually attempted to maintain a very close, cooperative association with Dompier Oil Company to insure that Texaco operations retail-wise in Spokane are maintained with a reasonable marketing balance between Distributor supplied volume, Tank Truck Dealer supplied volume, and salaried bulk plant supplied volume, to insure Texaco a maximum profit posture in relation to a distribution pattern to insure adequate brand coverage in Spokane. The following is a breakdown of the history of this balance/volume retail relationship in Spokane from 1970 to date.

As to the above-mentioned "Big West" episode, it was mentioned as it was the first time Dompier had actively sought

to accelerate their growth in the Spokane market.

VOLUME HISTORY--RETAIL MARKETING--SPOKANE

Name	# Accts	Total Vol./Mo.	Name	# Accts	Total Vol./Mo.
1970			1971		
TTDlr	4	25,365	TTDlr	6	151,835
Dompier	6	155,152	Dompier	8	272,057
Thruput	27	569,269	Thruput	27	630,855
1972-Commence Voluntary Alloc.			1973-Commence Mandatory Alloc.		
TTDlr	6	79,566	TTDlr	6	102,753
Dompier	7	455,025	Dompier	8	433,077
Thruput	26	590,408	Thruput	28	621,180

1974			1975 - 6 Mos.		
TTDlr	5	85,844	TTDlr	4	76,151
Dompier	8	457,038	Dompier	8	462,956
Thruput	22	523,270	Thruput	19	389,557

The above resume of volumes indicates that a large growth in volume occurred with our Distributor in 1972. This was primarily due to the type of retailing done by accounts supplied by Dompier. By and large, Dompier switched from supplying traditional full serve accounts to complete selfserve operations based on price retailing. Through our close rapport with our Distributor from 1971 to date we managed to counsel Dompier in not aggressively soliciting and supplying new accounts in Spokane, especially those in close proximity to existing 3rd Party accounts. The survey indicates, 1970 to date, Dompier has increased accounts supplied by a net of two. Volume increases have generally come from changes in methods of retailing.

Exhibit 1 - Our Distributor has asked for and received several

adjustments in allocations during the period of the Mandatory Allocation Program to date to account for various increases in volumes required by accounts due to updating of their methods of retailing.

Until March, 1975, Mr. Dompier's retail accounts included two carwashes and one full serve owned by him. Five locations were owned by others over which Dompier had no control as to when or where they purchased their brand of gasoline. In March of this year Dompier purchased outright two of the locations he supplied, that were owned by R. Koziuk; one he supplied owned formerly by Walker Enterprises and has a financial interest in one other unit. Thus he has total control of six of the eight units he supplied, and strong control of one other.

Exhibit 2 - Presently Dompier is negotiating to purchase outright a new account, which has been in operation one month as a Texaco contract retailer under FEA allocation commitment as such. If the transaction is consummated this will result in Dompier wholly owning seven units, partially one additional, and supplies to one non-owned unit, for a total of nine.

Due to the above mentioned recent transactions, Mr. Dompier is requesting additional allocation adjustments to accommodate the increased volume needs.

Exhibit 3:

1. To accommodate for product to be supplied to the two former Ray Kozuik stations which product in part may have formerly been purchased by Mr. Koziuk from sources other than Dompier.

2. To accommodate for increased volume needed to supply the purchased

accounts, Wolfe Enterprises, the presently operated contract retailer account.

Approval of all of Dompier's allocation requests per Exhibit 3, would result, in my opinion, in the following:

1. Materially shift the balance of product supplied by Texaco Inc. in Spokane at retail from a balance between TTDlr volume/contract retailer volume/thruput and Distributor which is now generally on an equal footing, to an over balance of 60% Distributor volume versus the rest, with resultant obvious consequences to Texaco's long term investment commitments in Spokane and losses in revenue. This estimated shift would result in approximately 400,000/month average 1975 investment thruput plus 76,000/month TTDlr volume versus Distributor volume averaging 604,000 per month. In addition, Dompier would

achieve a net increase of one unit to nine accounts, eight of which are owned by the Distributor and operated on self serve basis, pricing generally \$.05 to \$.10 below full serve investment units in Spokane and with a technical cost/RTW spread of \$.0365 per gallon. This would categorically allow our Distributor a retail marketing advantage over our present contract retailer and investment retailers with which they cannot compete.

2. Allowing Dompier to supply as a Distributor the present Mission and Magnolia contract retailer account, which Dompier proposes to purchase, will cost Texaco approximately \$.02/gallon revenue or \$31,920 per year based on present estimates of volume times the differential between RTW and Distributor TW, and will over balance the Distributor-Investment accounts-Contract Retailer marketing posture in Spokane to a

heavily volume oriented Distributor posture.

Taking into account that Dompier has in fact also been given allocation increase adjustments five times in the past year, and to date has left 741,116 gallons unused allocation "on the table", (this figure is an estimate based on latest adjustment in March, 1975 to base year of 6,578,346 versus sales to date of 2,918,615 and estimates for the balance of the year). Thus, in essence Dompier is asking for a total for 1975 allocation of 8,278,338 for this, or 689,861 per month versus a present proved need of 486,435 based on sales to date plus 52,080 projected volume of Mission and Magnolia station (based on first month's operation). This is a total actual need of 538,515 per month. Our Distributor requests 689,861 per month thus giving him

151,345 surplus each month with which to experiment price-wise to increase volume, to acquire new accounts, etc.

It is my recommendation based on the above facts and projections that our Distributor be advised:

1. FEA 17 allocation for Mission and Magnolia is based on contract retailer operation with allocation being assigned to Texaco Inc. location and not a pass through to Distributor.

2. Texaco Inc. continue supplying Mission and Magnolia as a contract account regardless of who owns the property.

3. Mr. Dompier's allocation not be subject to readjustment until such time as the differential between present allocation and actual sales be reduced to zero.

4. Aggressively seek higher Management's specific policy direction as to

the method of marketing in a metro area (volume versus long term lease commitment) to develop in line with basic Exxon exchange supply factors, etc.

It is hoped the above will be of value in ~~your~~ recommendations.

R. J. VOGELMAN

RJV:rlo'c

EXHIBIT 1

JOHN DOMPIER OIL CO.

GASOLINE

1972	5,460,300
Adjusted 3/17/74 to	5,615,568
Adjusted 5/22/74 to	5,879,970
Adjusted 5/6/74 for	
303 Third to: May	59,275
June	80,800
July	69,600
3/3/75 Adjusted to	6,578,346

Sales:	1972	5,460,300	
	1973	5,196,930	
	1974	5,525,833	.06%
	1975 to date	2,918,615	(this rate- 5,837.230)

1975 Allocation vs. sales:

	Allocation	Sales
January	445,500	476,805
February	390,000	474,080
March	556,780	508,630
April	510,055	518,950
May	606,631	451,700
June	577,781	488,450

Texaco:

1972	80,154,512	
1973	80,072,515	.1% Decrease
1974	78,516,255	2.1% Decrease

EXHIBIT 2

WOLFE ENTERPRISES

Open - 7/9/75

June -	8,600	6-26-75
July -	25,200	7-23-75
	33,800	

1. Average Inc. June Purchases: $\frac{33800}{15}$ = 2253

   7/9/75 thru 7/23/75

   Extrapolated volume - 31 days July

   31 x 2253 = 69,843

2. Average - Exclude June Purchases - 1680

   7/9/75 thru 7/23/75

   Extrapolated volume - 31 days July

   31 x 1680 = 52,080

EXHIBIT 3

J O H N D O M P I E R OIL COMPANY, INC.

North 407 Madelia Street
Spokane, Washington 99202
July 21, 1975

Texaco Inc.
T A Box 2625
Spokane, Wa.

Attention Mr. R. E. Bauman:

Gentlemen:

The accompanying request for an increase of 141,666 gallons per month in our BPV is for the purpose of supplying our newly acquired location on East Mission.

You will note that in the past twelve months we have not drawn 644,153 that has been allocated to us, amounting to approximately 10% of our total allocation. This 644,153 gallons will be needed to supply the additional product needed for the location on N. 502 Freya. Based on the information

available, Ray Kozuik purchased approximately 655,000 gallons from outside sources during this same period and this should account for more than the gallons we "left on the table" in the past twelve months.

We feel that the allocation adjustment for the purpose of supplying the location on Mission is a reasonable figure for the area. We purchased the station from Gary Wolfe when it became apparent that he intended to sell it and that if we did not buy it, the location would probably go to someone who would put in another brand of gasoline. This is approximately the gallonage that Texaco had allocated Gary Wolfe and would in no way change the supply situation in Spokane, but would simply result in a transfer of the allocation from Gary Wolfe to John Dompier Oil Company, inc.

Very truly yours,
JOHN DOMPIER OIL CO., INC.
/J. N. Dompier
J. N. Dompier, Pres.

JND:m
Enc.

PLAINTIFFS'

EXHIBIT 385

1. CIRCLE S. DISTRIBUTING CO.
   (Dick Snyder)
   E. 936 Sprague
   Spokane
   Supply only - no written agreement - discontinued purchases from Gull Dec. 1975.
   Volume Purchased:
   1970 - 339,550 1971 - 352,700
   1972 - 296,700 1973 - 282,450
   1974 - 257,011 1975 - 179,850

2. HERITAGE OIL CO.
   1106 N. Pines Rd.
   Spokane
   Supply only - no written agreement - discontinued purchases from Gull May, 1972.
   Volume Purchased:
   1970 - 487,400 1971 - 687,795
   1972 - 242,100

3. HERITAGE & ROBERTS
   (Sherman D. Monger)
   E. 706 Main St.
   Cheney
   Supply only - no written agreement - discontinued purchases from Gull May, 1972.
   Volume Purchased:
   1970 - 348,552 1971 - 346,865
   1972 - 101,600

4. PAUL GREIG
   Rtl Box 199-A
   Medical Lake
   (He also supplied a station at Broadway & Nettleton, Spokane but we have no gallonage separated by location or period supplied)
   Supply only
   Supply only - no written contract - purchased from Gull beginning in November, 1971; discontinued

purchasing from Gull in September, 1975.

Volume Purchased:

1971 - 8530	1972 - 177,056
1973 - 333,960	1974 - 493,500
1975 - 156,250	

5. R & E DEVELOPMENT CO.

(Mr. & Ms. Roy Walker)

E. 8006 Sprague

Spokane

Gull leased station from Walkers 10-15-65. Lease expired 10-14-75. Subleased to dealer (E. L. Stanley). Product was consigned.

Volume Purchased:

1970 - 356,950	1971 - 345,875
1972 - 343,885	1973 - 347,643
1974 - 334,004	1975 - 211,470

6. JAMES J. SWARTZ

E. 422 Sprague Ave.

Spokane

Lease cancelled 4-15-70. Total volume sold 1970 - 37,200.

7. MIKE McKAY

So. 3728 Grand Blvd.

Spokane

Station was leased by Gull and subleased to dealer. Product was consigned. Station was closed 11-20-72.

Volume:

1970 - 230,150	1971 - 418,671
1972 - 300,645	

8. FRANCIS AVENUE GULL

E. 620 Francis

Spokane

Station was originally leased from Briggs 10-1-66. Purchased from Briggs Estate 10-15-71, subsequently owned by Gull until station closed 7-31-78 upon sale of property by Gull. Station leased to dealer on commission basis.

Volume:

1970 - 635,200	1971 - 538,745
1972 - 580,890	1973 - 467,825
1974 - 464,780	1975 - 530,875
1976 - 610,147	1977 - 313,500
1978 - 171,025	

9. TRENTWOOD GULL

E. 13819 Trent

Spokane

Station owned by Gull, leased to dealer. Product was consigned to dealer until October, 1975, when station was converted to self-service. Dealer was on commission basis after conversion.

Volume:

1970 - 488,560	1971 - 614,285
1972 - 496,570	1973 - 482,650
1974 - 528,600	1975 - 577,257
1976 - 971,175	1977 - 884,945
1978 - 765,316 (8 mos.)	

10. RICHARD SHANE

N. 2103 Division

Spokane

Station owned by Gull, leased to dealer. Product was consigned to dealer until September, 1975, when station was rebuilt and converted to self-service. Dealer on commission basis after conversion.

Volume:

1970 - 476,950	1971 - 578,685
1972 - 712,215	1973 - 559,160
1974 - 498,261	1975 - 477,525
1976 - 848,477	1977 - 688,475
1978 - 466,163 (8 mo.)	

11. ARGONNE GULL

N. 1521 Argonne

Spokane

Station leased by Gull from Sisco 6-1-69, purchased by Gull from Sisco 5-15-75. Leased to dealer with product consigned until September,

1975, when station was rebuilt and converted to self-service. Dealer on commission basis after conversion.

Volume:

1970 - 279,600	1972 - 242,754
1971 - 302,975	1973 - 229,619
1974 - 362,251	1975 - 430,930
1976 - 833,020	1977 - 687,131
1978 - 528,950 (8 mo.)	

12. MEAD GULL

Pend O'Reille Highway

Mead, Wash.

Station owned by Gull, leased to dealer. Station opened 7-22-71 and was operated on commission basis since opening.

Volume:

1971 - 238,050	1972 - 643,665
1973 - 756,473	1974 - 814,950
1975 - 866,060	1976 - 1,036,710
1977 - 939,010	
1978 - 718,591 (8 mo.)	

13. VALU-MART (Fred Meyer)

E. 511 Francis Ave.

Spokane

Property leased by Gull. Station subleased to dealer. Station opened in October 1972. Operated on commission basis since opening.

Volume:

1972 - 262,850	1973 - 572,150
1974 - 745,923	1975 - 984,440
1976 - 1,190,941	1977 - 908,935
1978 - 699,158 (8 mo.)	

14. VALU-MART (Fred Meyer)

E. 5204 Sprague

Spokane

Property leased by Gull, station subleased to dealer. Station opened in May, 1972. Operated on commission basis since opening.

Volume:

1972 - 583,161	1973 - 801,544
1974 - 835,651	1975 - 993,594

1976 - 1,002,709 1977 - 888,719

1978 - 700,718 (8 mo.)

15. MANITO GULL

S. 3805 Grand

Spokane

Owned by Gull (acquired 6/72), leased to dealer. Station opened in December, 1972. Operated on commission basis since opening.

Volume:

1972 - 50,065 1973 - 519,113

1974 - 714,068 1975 - 906,060

1976 - 1,003,030 1977 - 765,499

1978 - 557,987 (8 mo.)

(21)

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

—*vs.*—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER TEXACO INC.

MILTON J. SCHUBIN
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(212) 836-8000

Counsel of Record and Attorney for Petitioner Texaco Inc.

Of Counsel:

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White Plains, New York 10650

Wm. Fremming Nielsen
PAINE, HAMBLEN, COFFIN, BROOKE & MILLER
1200 Washington Trust Financial Center
Spokane, Washington 99204

August 3, 1989

42 pp

QUESTIONS PRESENTED

1. Whether the Robinson-Patman Act is violated if a manufacturer merely sells to wholesalers at a lower price than to retailers (so as to enable wholesalers to perform their role of reselling to retailers and earn a profit), unless the manufacturer selling to both levels of trade (wholesale and retail) either:

   (a) Discriminates in price among its wholesalers, selling to each wholesaler at a price that would only cover the particular wholesaler's costs (assuming they were determinable), or

   (b) Otherwise polices and controls each wholesaler's prices to its retailer customers to assure that the wholesaler does not resell to retailers at a lower price than the manufacturer?

2. Whether the *Morton Salt* "self-evident" inference of injury to competition from sales over time to competing customers at different prices (334 U.S. at 50) has any application to the age-old practice of selling to wholesalers at lower prices than to retailers?

3. Under the Robinson-Patman Act and Section 4 of the Clayton Act, where the allegedly favored customer is a wholesaler, the allegedly disfavored customer a retailer, and the purported illegal price discrimination is a discount given to all wholesalers, may the retailer predicate injury and recover treble damages on the basis of how much better off he would have been had he too received the wholesaler discount, in whole or part?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioner Texaco Inc. and respondents Ricky Hasbrouck, d/b/a Rick's Texaco, James O. Sills, Alva N. Blue, John W. Bevan, Ricky A. Rigg, Gene C. Robinson, Mollie J. Robinson, Albert E. Allen, Harold C. Hardwick, Henry Rigg, Vincent Lies, and Ralph O. Webber.

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Riverway Gas Pipeline Company
Texaco Pipeline Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Productos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.

Texaco Petroleum Company
Texaco Trinidad, Inc.
Texaco Petroleum Company
Texaco Butadiene Company
Texaco Chemical Company
Texaco Canada Inc.
Texaco Canada Resources Ltd.
Texaco Canada Resources
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER TEXACO INC.

OPINIONS BELOW

The Amended Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 842 F.2d 1034 and is reprinted as Appendix A to the Petition. The Opinion of the United States District Court for the Eastern District of Washington is reported at 634 F. Supp. 34, and is reprinted as Appendix B to the Petition.

JURISDICTION

The original Opinion of the Court of Appeals for the Ninth Circuit was entered on October 26, 1987. Following a timely petition for rehearing, the court of appeals entered an Amended Opinion on March 17, 1988 and denied the petition for rehear-

ing on that date. The Order denying the petition for rehearing is set forth as a preface to the Amended Opinion. (PA-4).[1]

The Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1). Certiorari was granted on June 12, 1989.

STATUTORY PROVISIONS INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

1 References to "PA" are to Petition for Certiorari Appendix A, the Court of Appeals Opinion; references to "PB" are to Petition for Certiorari Appendix B, the District Court Opinion; references to "JA" are to the Joint Appendix; references to "R." are to the reporter's trial transcript.

STATEMENT OF THE CASE

Respondent Hasbrouck and eleven other retail service station dealers ("Hasbrouck" or "plaintiffs") in the Spokane area were awarded treble-damages under § 4(a) of the Clayton Act, 15 U.S.C. § 15(a), because their supplier, Texaco Inc. ("Texaco"), also sold Texaco-brand gasoline in the same area to a wholesaler, John Dompier Oil Company ("Dompier"), at a wholesale discount of 2.65 to 3.95 cents per gallon below the per gallon price to direct-buying retailers. The damages covered nine years from January 1972 through April 1981, and encompassed two periods: a later one during which the wholesaler itself operated some retail stations, and an earlier one during which it did not. Plaintiffs gave the jury damage estimates that combined both periods and precluded differentiation between them. JA 353-54. No distinction was made between Dompier's employee-operated stations (when they existed) and Dompier's independent retailer customers for purposes of establishing injury to competition and other elements of the offense. PB-6, n.6.

For the period Dompier was solely a wholesaler, liability under § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), was premised on the view that a supplier selling to wholesalers at a uniform wholesaler price and to retailers at a uniform higher retailer price becomes guilty of illegal price discrimination (a) if one of its wholesalers chooses to pass on a portion of its margin to a retailer, and (b) if that retailer, in turn, chooses to pass on some of that margin to consumers, and (c) if the lower consumer price may be detrimental to a plaintiff retailer who competes with the wholesaler's retailer-customer. The jury was instructed that the requisite competitive injury could be inferred from the fact that wholesalers paid substantially less than retailers for a long time. It was allowed to base damages on how much better off the plaintiff retailers would have been had they too received the wholesaler discount, the premise being that plaintiff retailers were entitled to price parity, not with the wholesaler's retailer customers, but with the wholesaler itself.

To sustain the verdict, the courts below adopted these theories of discrimination, injury to competition and damages. Manufacturers wishing to avoid potentially massive liabilities to direct-buying retailers are instructed by the court of appeals that henceforth they must either tailor their wholesaler price to each wholesaler's costs (to make it financially impractical for any wholesaler to reduce prices)[2] and/or otherwise make certain that its wholesalers do not pass on any of their margin to retailers who might compete with direct-buying retailers:

> "That all wholesalers were offered the same discount would be an appropriate defense in a case where the plaintiff and the other customers of the defendant were all wholesalers performing at the same level in the chain of distribution. *Here, however, only the other customers are wholesalers; the plaintiffs are retailers* who are further down the chain of distribution. The injury occurs at the latter level and results from the receipt by wholesalers of a functional discount in excess of the value of the services they perform, all or a portion of which they then pass on to the retailers they supply.
>
> * * *
>
> Despite the fact that Dompier and Gull, at least in their capacities *as wholesalers, did not compete directly with Hasbrouck*, a section 2(a) violation may occur if (1) *the discount they received was not cost-based* and (2) *all or a portion of it was passed on* by them to customers of theirs who competed with Hasbrouck." PA-7-8 (emphasis added).

2 Any price reduction by a wholesaler was viewed below as demonstrating that the wholesaler should have been charged more by the supplier:

> ". . . had the amount of the discounts been merely reimbursement for the value of the services performed by the favored buyers, it is improbable that the discounts (or a portion) could have been passed along and been reflected in the retail price. Consequently, the price differential and its resultant impact on competition cannot be legitimized under the rubric of functional discount." PB-6.

I. Statement of Facts

A. The Competitive Context

The Spokane, Washington, retail gasoline market concededly was highly competitive throughout the relevant period. JA 37, 54, 110-13, 253-54, R. 419, 1205-06, 1227-28. In addition to plaintiffs and the Dompier-supplied stations, the market was served by numerous major brand gasoline stations (including other Texaco stations, JA 20). The period was also characterized by the entry of many new independent brand gasoline marketers operating low overhead, low price and high volume stations, and by the related introduction and growing market acceptance of self-service stations (customer pumps gasoline) and mini-service stations (attendant pumps gasoline but customer performs other services, *e.g.*, inserting motor oil). JA 62-63, 64, 175-77, 206, R. 753, 917-19. The latter were in contrast to the traditional full service stations, which most plaintiffs operated, where dealers sold gasoline and also provided mechanical repair services, lubrication and oil changes, towing services and tires, batteries and automotive accessories ("back-room sales"). JA 44, R. 1118-20. Plaintiffs acknowledged that the market demanded a 4-cent to 8-cent retail price differential between self-service and full service gasoline. JA 205-06, R. 283-84, 752-53, 1857-61. In addition, plaintiffs generally priced gasoline several cents above the market. R. 910-11.[3]

1. The Texaco Brand and Wholesaler Gull

As many lower-priced non-Texaco brand competitive service stations were nearer to plaintiffs than Dompier-supplied Texaco stations, plaintiffs predicated their claims for damages on the existence of such a degree of customer loyalty to the Texaco brand as to cause their profits to be measurably impacted by

3 Hasbrouck, for example, explained he increased his margin (the difference between his buying and selling price) over the period, and, if he "needed a little extra money," would raise it higher. JA 259. Plaintiff Sills believed he was often the highest priced dealer in Spokane, with a margin that ran as high as 13 cents. R. 665-66, 674, 682. *See also* R. 359-62 (Bevan); R. 601 (Blue); R. 1245-46, 1270 (Hardwick); R. 1297, 1331-32 (Webber).

changes in price at Dompier-supplied stations, regardless of their remoteness and the proximity of other low-price competition. JA 285-87, 299-300, R. 1873.[4] Accordingly, damages were not claimed with respect to Texaco's gasoline sales to another wholesaler, Gull Oil Company ("Gull"), because Gull did not market under the Texaco brand. JA 24 ¶ 9, 304, R. 1715-16, 3061-65. Plaintiffs acknowledged that consumers did not know Gull was selling product purchased from Texaco (R. 1716) and, indeed, Hasbrouck testified that even he was not so aware, and never noticed his customers at Gull stations. JA 256. Since no Gull station was claimed to have caused compensable damages to any plaintiff, Texaco's sales to Gull are without present significance.[5]

B. The Period of Retail Operations By Dompier

In July 1974, 30 months into the damage period, a station that had been supplied by Dompier as wholesaler (303 Third Avenue), was bought by Dompier's then president, Neil Dompier, leased to Dompier and, thereafter operated by Dompier's employees. JA 152-55, 182-83. A year later, in July 1975, Neil's father John bought two other stations that had been supplied by Dompier as wholesaler (N. 502 Freya; N. 3306 Monroe), and similarly leased them to Dompier for operation by Dompier employees. JA 153, 163-64.[6] In 1978, a fourth station that was a customer of Dompier (N. 2924 Market) similarly was acquired and converted to Dompier employee operation. R. 914. Plaintiffs' damage claim for the full 1972-81 period rested on these four stations, each of which was self- or mini-service. R. 1739-41, 2933-34, 3061-63.

From July 1975 to the end of the damage period in 1981, plaintiffs' damages were predicated solely upon Dompier's *retail* operations at these stations (the first three stations to 1978, and then all four). R. 2940-47. As plaintiffs explained, they disregarded Dompier's continuing wholesale sales to independent retailers because generally they were at prices that were not below those Texaco charged plaintiffs. R. 1938-40, 2942, 2949-50. The period of Dompier-as-retailer damages began with July 1975 (42 months into the damage period) because, according to plaintiffs' economic expert, before that date Dompier "was not yet . . . substantially a retailer of gasoline." R. 1939.

C. The Period Dompier Was Only A Wholesaler

All other damages claimed by plaintiffs were based upon Dompier's purchases and sales as a wholesaler.[7] In this capacity, Dompier's functions included: persuading accounts to purchase gasoline and other products from it; handling billing; extending credit; carrying accounts receivable; maintaining

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4 Hasbrouck, for example, claimed he was caused competitive problems by a Dompier-supplied station "clear across town" (R. 1569), notwithstanding that 75% of his customers came from his immediate neighborhood (R. 1564) and that other competitive stations, including plaintiff Allen's low-priced Texaco-brand station, were much closer. (R. 1569, 1574).

5 The district court declined to exclude Gull from consideration by the jury. R. 3071. The jury was expressly permitted to rest findings on such issues as a plaintiff's competition with a "favored" purchaser exclusively upon Gull-supplied stations, notwithstanding that compensable damages were sought solely as to Dompier-supplied stations. JA 383, 390, 395-96, 397-99, 399.

6 A major reason for taking over these stations was that their prior owner, Koziuk, was "bootlegging" non-Texaco gasoline, commingling it with what he bought from Dompier and selling it as "Texaco" gasoline at these stations at low prices. Dompier increased the retail price at these stations when they were acquired. R. 898-900. Plaintiffs assertedly were injured by Koziuk's prior low prices. Virtually all customers called by plaintiffs to testify to patronage diversion specified the low prices at Koziuk stations. *See, e.g.*, R. 479, 484-85 (Green), R. 636-37 (Hardin), R. 1330-31 (Scroggin), R. 1345 (Mottaz), R. 1587 (James), R. 1596 (Town), R. 1602-03 (Rouse).

7 Two car wash-service station facilities owned by Red Carpet Service, Inc., a corporation owned by John Dompier, bought gasoline from Dompier during this time. JA 181. As car washes, these facilities charged gasoline prices higher than those charged at the average major brand full-service station. R. 1143-44. Plaintiffs explicitly disclaimed seeking compensable damages as to the Red Carpet stations. R. 1863-66.

trucks[8], a warehouse and bulk storage facilities; evaluating the purchase and lease of properties for service stations; employing sales and office personnel and facilities; and providing sales promotions and related services to its customers. R. 929-35, 942-44. It was an Admitted Fact (No. 7) that:

> "Throughout the relevant time period, the prices Dompier charged to the retail service stations and car washes to which Dompier supplied gasoline were set by Dompier." JA 369.

Dompier's President testified that Texaco did not interfere in Dompier's pricing.[9] R. 895. He further confirmed that throughout the period from 1970 through 1981, Dompier "sold gasoline to different dealers at different prices on or about the same day." R. 946.

Similarly, the retail service station operators buying Texaco gasoline from Dompier made their own independent determinations about the prices at which they would sell to the public, without interference from Dompier or Texaco. R. 895-96. Some of these customers, including the four stations that subsequently became Dompier-operated, sought to compete on the low-overhead, minimal-service and low-price basis characteristic of new service station competition in Spokane at the time. JA 175-77, R. 917-19.

Plaintiffs acknowledged that Texaco's price to Dompier would not affect them unless (a) Dompier independently chose

8 Dompier was paid a hauling allowance to pick up gasoline from Texaco's terminal and haul it to Dompier's bulk plant. Rather than trucking it to the bulk plant, and rehauling it from there to the customers, Dompier generally would try to make several deliveries directly from Texaco's terminal. Dompier did not believe the hauling allowance fully covered its delivery expenses. R. 1142.

9 At the time of testimony, Dompier no longer was a Texaco distributor but a Conoco distributor. R. 944. Dompier received a covenant not to sue from plaintiffs prior to being called as a witness by them. R. 857.

to pass along some portion of his wholesale margin to a retailer and (b) the retailer independently chose to further pass some portion to the public. Even if Texaco increased its price to Dompier, plaintiffs' sales would not necessarily increase because it still would depend upon what Dompier's retailers decided to do. R. 1979.

Thus, plaintiffs' damages varied over the 1972-75 period and depended not on anything done differently by Texaco, but on what Dompier and its customers did. For example, plaintiffs concluded they had no damages between October 1974 and July 1975:

> "During that particular period the Dompier supplied stations were, in fact, paying a price equal to or on occasion greater than what the plaintiffs paid." JA 302.[10]

Nothing about Texaco's uniform wholesaler price compelled Dompier to one day raise its prices to some customers and cut prices to others, and to do something different the next day. Plaintiffs' economist made no attempt to relate Dompier's prices to Dompier's costs: it apparently could not have been done from Dompier's profit and loss statements and would have required a separate study. R. 1956-57.[11]

D. Damages for the Period Dompier Was Only A Wholesaler

For purposes of damages, plaintiffs did not claim they were entitled to be treated like Dompier's customers, their alleged competitors, but rather like Dompier itself, the wholesaler. Plaintiffs did not link the amount of their claimed damages to the portion of the wholesaler discount that allegedly exceeded

10 This was the situation, plaintiffs' economist stated, for many other time periods as well. R. 2947-49. Exhibit 5401 shows that between February 1974 and June 1979, plaintiffs paid Texaco less than, or the same as, the prices paid by Dompier's retail customers to Dompier at least 82% of the time. Def. Ex. 5401; R. 2721.

11 Nor did the district court believe it warranted to allow Texaco to seek to establish Dompier's costs at trial. R. 1134.

Dompier's costs. They did not predicate damages on the average of the price reductions received by Dompier's customers or even the maximum price reduction received by any Dompier customer. Nor, of course, did they predicate them on whatever fraction of that amount Dompier's customers may have actually passed on to the public by way of the price reductions that purportedly injured plaintiffs.

Plaintiffs' damages, instead, were constructed on the assumption that Texaco was given a hypothetical order in January 1972, effective immediately, to charge the identical price to wholesaler Dompier and retailer plaintiffs. Assuming such an inconceivable order,[12] plaintiffs postulated three basic scenarios: Dompier pays the retailer price; plaintiffs pay the wholesaler price; or Dompier's price goes up halfway and plaintiffs' comes down halfway. For each of these possibilities, plaintiffs' economist calculated plaintiffs' hypothetical profits under two assumptions: either all or half the price difference is passed on by Dompier and plaintiffs. His 1972-1981 total for each plaintiff under each of these six assumptions constituted plaintiffs' quantification of their damages.[13] In addition, the jury was given a number for each plaintiff for the full period representing straight quantification of "automatic damages," *i.e.*, multiplication of the total gallons each plaintiff purchased by the amount of the wholesaler discount. Pl. Ex. 912; R. 1722, 1723; R. 1725.[14]

12 It would destroy the wholesaler's investment and business, compel discrimination against the wholesaler's customers, and require discrimination in favor of plaintiffs as against other Texaco retailers. Facing such an order, a supplier would wish to consider discontinuing business completely with at least one class of trade—retail or wholesale.

13 *See* Pl. Ex. 913; R. 1755; Pl. Ex. 914; R. 1756, 1758; Pl. Ex. 915; R. 1761; Pl. Ex. 916; R. 1761; Pl. Ex. 917; R. 1762, 1763; Pl. Ex. 918; R. 1762, 1763.

14 "Automatic damages" are not recoverable as a matter of law. J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 561 (1981). Nonetheless, the district court, in its opinion denying Texaco's motion for judgment n.o.v., held that the danger "the jury would automatically award damages based upon the amount of discrimination, was alleviated by the court's oral admonitions and instructions to the jury," and upheld its decision to admit Exhibit 912. PB-15-16.

Damages calculated on the basis of having the "Price Discrimination Eliminated by Texaco Increasing Dompier's Purchase Price to Plaintiffs' Purchase Price" totalled $231,197.70, including amounts for "Lost Profits from Backroom Sales." Pl. Ex. 914; R. 1756. The aggregate jury award was close to twice as much. JA 11-12. The jury plainly took the opportunity given it to base damages on how much better off the retailers would have been had they been "favored" over Dompier's retailer customers and other Texaco retailers and received the wholesaler discount.

II. Prior Proceedings

The Complaint was filed on January 30, 1976. Following trial in the United States District Court for the Eastern District of Washington in which the jury found for plaintiffs, the district court (per Callister, J.), on March 26, 1980, granted Texaco's motion for judgment n.o.v. *Hasbrouck* v. *Texaco Inc.*, 1980-2 Trade Cas. (CCH) ¶ 63,343 (E.D. Wash. 1980). It did so because plaintiffs, notwithstanding this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), chose to confine their evidence to "automatic damages" pursuant to the Ninth Circuit's pre-*Brunswick* opinion in *Fowler Mfg. Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). The district court correctly recognized that *Brunswick* had effectively undermined *Fowler*. By the time of the appeal, this Court too had expressly rejected "automatic damages" on the basis of *Brunswick* in *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). In *Hasbrouck* v. *Texaco Inc.*, 663 F.2d 930 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982), the Ninth Circuit acknowledged that "*J. Truett Payne* confirms the trial court's ultimate conclusion . . ." (663 F.2d at 932) and that "the Supreme Court relied upon *Brunswick* in deciding *J. Truett Payne* . . . ." (663 F.2d at 933 n.1). Nonetheless, it remanded for a new trial, con-

cluding that the district court erred by considering *Brunswick* and not adhering to *Fowler* until it was expressly overruled.

In determining the scope of the new trial upon remand, the court of appeals excluded two issues it had decided in plaintiffs' favor (663 F.2d at 933): one, relating to the effect of federal mandatory gasoline pricing decisions; the other relating to the jurisdictional prerequisite to a Robinson-Patman claim that " 'at least one of the two transactions which, when compared, generate a discrimination . . . cross[es] a state line.' " *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974).[15]

At the new trial, which commenced before Judge Quackenbush on June 4, 1985, the damage period was extended to cover 1972 through 1981. Plaintiffs conceded (in the context of a discussion of the "meeting competition" defense) that if Texaco's conduct was lawful for any portion of the 1972-1981 period—including the period before July 1974 when Dompier functioned solely as a wholesaler—judgment was to be entered for Texaco. JA 353-54. The district court, while expressing skepticism about plaintiffs' election to seek (and not break out) damages for the period Dompier had no salary-operated stations,[16] allowed the case to proceed on that basis. The district court denied motions for judgment notwithstanding the verdict

15 There is no dispute that the sales to plaintiffs and Dompier were all within Washington State. Notwithstanding *Copp*, the court of appeals held the jurisdictional requirement satisfied because "of a national exchange agreement between [Texaco] and another refiner covering the gasoline involved . . . ." (663 F.2d at 934)—*i.e.*, on the interstate commerce involved in Texaco's *acquisition* of gasoline rather than the local nature of its *sales* to the "favored" and "disfavored" purchasers. Texaco and other oil companies obtained gasoline from Exxon in Spokane.

16 *See, e.g.*, JA 315 (". . . there were no salary operated stations prior to '74 . . . they are not broken out, I might say."); JA 316 ("my concern is the Dompier supplied, nonsalaried sales, where in fact he is selling as a wholesaler"); JA 319 ("Is Texaco supposed to say to its wholesaler who is selling to Koziuk you have to sell that at the same price we are selling to the plaintiffs?"); JA 320 ("Are you saying that Texaco sets its price based upon whatever Dompier is charging Koziuk?").

or a new trial (Petition Appendix B) and judgment was entered for threefold the verdict, $1,349,700, and attorneys' fees.

The court of appeals, necessarily confronting the issue of the legality of Texaco's sales to Dompier during the period Dompier was solely a wholesaler, affirmed (Petition Appendix A). Recognizing "that, generally, selling at different prices to customers who are at different levels of distribution will not constitute a violation of the Robinson-Patman Act" (PA-9), the court nevertheless ruled Texaco liable because Dompier had passed "at least a portion" of the wholesaler discount it received to its retailer customers (who competed with Hasbrouck), and the amount of the wholesaler discount was greater than Dompier's cost of wholesaling. PA-8-9. The court also concluded that since the wholesaler-retailer "price differential was substantial and . . . was in effect for several years," the *Morton Salt*[17] inference of competitive injury was applicable, leaving "little doubt that Texaco's pricing policy [selling at a uniform wholesaler price and a higher uniform retailer price] constituted price discrimination that was unlawful . . . ." PA-11-12. The court also upheld awarding damages on the premise that the retailers were entitled to price parity with the wholesaler (rather than the wholesaler's retailer-customers) and that "postulating the elimination of the [wholesaler-retailer] price differential, either by increasing the favored buyer's price, decreasing the disfavored buyer's price, or a combination of the two," was appropriate. PA-16.

17 FTC v. Morton Salt Co., 334 U.S. 37 (1948).

SUMMARY OF ARGUMENT

A. It has been universally recognized by the courts, the enforcement agencies and the commentators, that a supplier who sells to retailers at a uniform retailer price and to wholesalers at a uniform lower wholesaler price, fully complies with the Robinson-Patman Act, 15 U.S.C. § 13(a), and has no duty to police the resale prices of its independent customers or monitor, and base discounts upon, their costs.

The decision below, holding a supplier liable for *not* discriminating in price among its wholesalers[18] and imposing treble-damage liability on it for injuries caused by the decisions of an independent wholesaler and its independent retailer-customers to lower their own resale prices, departs from established precedent, from practicality, and from Congressional intent. Its rule of law would multiply distribution costs, rigidify and increase consumer prices, encourage resale price maintenance in violation of the Sherman Act, 15 U.S.C. § 1, and jeopardize the businesses of wholesalers.

B. During the years Dompier functioned solely as a wholesaler, it was not on the same functional level as plaintiff retailers and did not compete with them. The *Morton Salt* "self-evident"[19] inference of competitive injury from long-standing and significant price differences to purchasers *competing at the same level of trade*, is hardly "self-evident" when applied to purchasers at *different* levels of trade, where different prices are required. However, in the district court, the jury was instructed to treat the wholesaler as a *competitor* of plaintiff retailers by attributing to the wholesaler the functional level of its retailer customers.[20]

18 The court of appeals took the position that while a supplier that sells to all wholesalers at a uniform price is insulated from price discrimination claims by any wholesaler, treating wholesalers equally can violate the Robinson-Patman Act if the plaintiff is a retailer. Under the Ninth Circuit view, if the plaintiff is a retailer, the supplier may be guilty of unlawful price discrimination unless the supplier can show it discriminated in its prices among wholesalers on the basis of each wholesaler's varying costs of doing business. PA-7-10.

19 *Morton Salt, supra*, 334 U.S. at 50.

The court of appeals more directly held the Act's injury-to-competition requirement satisfied by sales over time to wholesalers at substantially lower prices than retailers.[21] Respectfully, injury to competition cannot be presumed from price differences to different distributional levels.

C. When Dompier was solely a wholesaler, antitrust injury allegedly flowed from decisions of some Dompier independent retailer customers to pass along to the public some part of whatever portion of Dompier's wholesalers' discount Dompier independently decided to pass along to them from time to time. Absent their independent decisions, there would have been no violation or claim of antitrust injury.

Assuming Texaco is legally responsible for these various decisions that it could not lawfully control and in which it did not participate, the appropriate damage inquiry would be how much better off would plaintiffs have been had their competitors, Dompier's customers, not received the discounts from Dompier and not used them competitively. Instead, plaintiffs quantified damages on a basis having no relationship to the decisions of Dompier and its customers or to any right to equal treatment with their competitors, Dompier's retailer customers.

20 Jury Instruction No. 23(A) provided:

"In order for a non-favored and favored purchaser (*or its customer*) to be *in competition with each other*, the non-favored and the favored purchaser (*or its customer*) must be on the same functional level (retailer-retailer, or wholesaler-wholesaler).

You the jury, as the sole judges of the fact must determine whether Dompier and/or Gull (*or their customers*) were on the same functional level as the plaintiffs." JA 399, (emphasis added).

21 "It is undisputed that a price differential existed between the rate Texaco charged Hasbrouck [the retailer] and the rate it charged Dompier and Gull [the wholesalers]. Furthermore, there was evidence that the price differential was substantial and that it was in effect for several years. There can be little doubt that Texaco's pricing policy constituted price discrimination that was unlawful unless it could be justified under the Act." PA-11-12.

Plaintiffs grounded damages on the notion they were entitled to more than their competitors: to equal treatment with the wholesalers. Nor did they limit themselves to how much better off they would have been had Dompier not received 100% of its discount. They also sought and obtained an award based on how much better off they, as retailers, would have been had they received the entire wholesaler discount. Such amounts are not "antitrust damages" within this Court's teachings in *Brunswick*[22] and *J. Truett Payne*[23] and, instead, would represent a price discrimination in plaintiffs' favor.

ARGUMENT

I. It is Not Illegal for a Supplier to Sell to Wholesalers at a Uniform Wholesaler Price Lower than Its Price to Retailers

A. Fundamental Commercial Facts Compel Different Prices to Different Classes of Trade That Are Not Based On Just Enabling Wholesalers or Retailers to Recover Their Costs

Anyone in the business of selling to retailers must be able to buy for less than he or she sells. In short, wholesalers *must* get a lower price than retailers. If they cannot, there will be no wholesalers. In addition, the margin between the buying price and selling price *must* be sufficiently large to satisfy the wholesaler that it is in the right business—that the potential exists not only to recover expenses but also to earn a satisfactory profit, making the risks, investment and effort worthwhile.

Thus, prices to the members of any class of trade (retail or wholesale) must necessarily do more than cover costs; they must enable the retailer or wholesaler to earn a satisfactory profit. Otherwise, they would not continue to sell the manufacturer's product. In a competitive economy, each retailer and wholesaler determines for itself how best to maximize its profit: when

22 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

23 J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981).

to increase its margin and when to cut it in the hope of adding sales; when to reduce expenditures and when to gamble on expanding them. Because decision-making and situations vary, it would be a remarkable coincidence for any two members of a class of trade paying the same price for a product to end up with the same costs and profits.

It is in the light of these fundamental commercial facts (which hardly would have come as a surprise to Congress) that the present issue should be evaluated.

B. The Courts and Enforcement Agencies Have Consistently Recognized the Legality of Selling To Wholesalers At Lower Prices Than Retailers

Throughout the history of the Robinson-Patman Act, it has been recognized that wholesalers require lower prices than retailers (to enable them to perform their function of reselling to retailers at a profit) and that compliance with the Act is assured by selling to all purchasers in the wholesaler class of trade at a uniform price that is not higher than the price to retailers. This is exemplified by the Order affirmed in pertinent part by this Court in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), which prohibited different prices among wholesalers and among retailers, but allowed different pricing between the two levels of trade so long as retailers were not charged less than wholesalers.[24]

24 "The prohibiting paragraphs of the order were:

'a) By selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.

'b) By selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such retailers.

(footnote continued)

This Court, in *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1963), succinctly summarized Congressional intention in enacting the Robinson-Patman Act:

> "In short, Congress intended to assure, to the extent reasonably practicable, that businessmen *at the same functional level* would start on equal competitive footing so far as price is concerned." 371 U.S. at 520 (emphasis added).[25]

It has always been fundamental that businesses at higher functional levels could, and necessarily would, start at lower price footings.[26] Responding to the obvious importance of having a clear demarcation line between the lawful and the unlawful to permit normal structuring of distribution arrangements, the Federal Trade Commission (the agency with principal responsibility for Robinson-Patman enforcement) has firmly drawn such a line—so long as a wholesaler is acting as a wholesaler (*i.e.*, selling to retailers):

> "the difference in the prices that the wholesaler and the retailer pay *cannot support* a claim of secondary line competitive injury under the Act." (emphasis added).[27]

'c) By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer.' " 334 U.S. at 51 n.19.

25 *See also* Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 12 (1976) ("focus of Robinson-Patman is on competition 'at the same functional level' ").

26 "[T]he competitive effects requirement permits a supplier to quote different prices between different distributor classes—so long as those who are higher up (nearer the supplier) on the distribution ladder pay *less* than those who are further down (nearer the consumer)." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 174 (1962) (emphasis in original).

27 Boise Cascade Corp., [1983-87 FTC Complaints and Orders Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,330 at p. 23,394 (1986). In reversing the Commission's expansive view of the competitive injury

The lower courts too have repeatedly emphasized the necessity of " 'a sale to two different buyers on the same functional level of competition, charging different prices to each.' "[28]

C. The Lower Court's Newly Minted Standards Are Without Warrant And Cannot Lawfully or Feasibly Be Met: Prices to Wholesalers Cannot be Cost-Based, And Suppliers Cannot Prevent Independent Wholesalers And Retailers From Reducing Prices

Explicitly rejecting the legal certainty (PA-9) that has enabled manufacturers to distribute products through wholesalers and retailers throughout the decades,[29] the court of appeals estab-

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standard, the Court of Appeals cast no doubt on the above. Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988).

The Justice Department has also affirmed the legality of functional level discounts to wholesalers:

> "The Robinson-Patman Act permits such discounts as long as each businessman performing a particular function gets the same discount for the performance of such function, and so long as the discount reflects the purchasers' relative positions in the chain." U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 84 (1977).

28 Burns v. Reynolds Metals Co., 1988-2 Trade Cas. (CCH) ¶ 68,317 at 59,817 (6th Cir. 1988), *quoting* Eximco, Inc. v. Trane Co., 737 F.2d 505, 515 (5th Cir. 1984). *See also*, with respect to the clear legality of selling to wholesalers at less than to retailers, White Indus., Inc. v. Cessna Aircraft Co., 845 F.2d 1497, 1500 (8th Cir.), *cert. denied*, 109 S. Ct. 146 (1988); Edward J. Sweeney & Sons, Inc. v. Texaco Inc., 637 F.2d 105, 120-22 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); M.C. Mfg. Co., Inc. v. Texas Foundaries, Inc., 517 F.2d 1059, 1066 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

29 *See, e.g.*, Mennen Co. v. FTC, 288 Fed. 774, 781-82 (2d Cir.), *cert. denied*, 262 U.S. 759 (1923):

> "[The manufacturer] did not discriminate as between retailers but sold to all retailers on one and the same scale of prices. And it did not discriminate as between wholesalers but sold to all wholesalers on one and the same scale of prices. There is nothing unfair in declining to sell to retailers on the same scale of prices that it

lished a rule of deliberate uncertainty. A supplier could not know until suit and trial whether its sales to wholesalers had been lawful because legality would depend upon what the supplier could neither know at the time of sale nor control—each wholesaler's "costs" and independent pricing decisions.

1. Wholesaler Costs

a. Where buyers are members of different classes of trade (retail and wholesale), their costs simply are not relevant to the prices they pay. An expensively-located retailer easily may have greater costs than its wholesaler working out of a shed in a run-down neighborhood. But the wholesaler will pay less because a lower price is essential to permit the business on the higher level (wholesaler) to sell to the lower level (retailer) and to want to do so.[30] For a supplier, before accepting orders, to have to measure the costs of the various customers to which it sells and adjust prices accordingly, would be a pointless, astronomically-expensive exercise—if it could be done at all (which it cannot).

b. A rule requiring calibration of prices to wholesalers on the basis of each wholesaler's costs of wholesaling is patently

> sold to wholesalers, even though the retailers bought or sought to buy the same quantity the wholesalers bought.
>
> • • •
>
> Whether a buyer is a wholesaler or not does not depend upon the quantity he buys. It is not the character of his buying, but the character of his selling, which marks him as a wholesaler . . . . A wholesaler does not sell to the ultimate consumer, but to a 'jobber' or to a 'retailer.' "

Mennen was disapproved on a different issue in George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245, 254 (1929). On the legality of selling to wholesalers and retailers at different prices, it was unquestioned.

30 Pricing to different classes of trade is thus wholly distinguishable from attempts to justify different prices *within* the same class of trade on the basis of the cost of a special function undertaken by a member of the class. Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1132 (D.C. Cir. 1988). Both situations are sometimes loosely referred to as "functional discounts," accounting for much confusion.

impracticable. These are costs which a supplier cannot be expected to know and which will vary from wholesaler to wholesaler and day to day.[31]

c. It is legal to sell to wholesalers for less than to retailers without regard to their costs:

(i) First, because it is necessary if there are to be wholesalers, and Congress—fully understanding that wholesalers were paying less than retailers[32]—plainly did not intend that the Robinson-Patman Act destroy them;[33]

(ii) Second, while the Court has held "price discrimination" to mean no more than "price difference" in the context of a primary-line claim (geographic price differences injurious to *competitors of the seller*),[34] the Court observed that the legislative history suggested another meaning in the context of secondary-line claims (those by *purchasers* from the seller). Thus, it observed that Representative Utterbach (a manager of the Conference Bill which became § 2(a)):

31 As an independent business, each wholesaler makes its own decision about where to locate its facilities, what kinds of equipment to purchase and when to upgrade, what number and types of employees to hire and how best to compensate them, whether and how much to borrow, and where and when, what strategies to pursue to attract and retain customers, what amount of credit to extend to which customers, what time, effort and money to expend in helping its customers be successful, what products to handle, what size inventories to maintain of each, how frequently to make deliveries, and myriads of other matters—each of which can significantly impact cost.

32 ". . . to suppress such differentials would produce an unwarranted disturbance of existing habits of trade." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 9 (1936). National Recovery Administration codes in effect from 1933 to 1935 set minimum discounts manufacturers were *required* to grant wholesalers. *See* U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 108-09 (1977).

33 To the contrary, Congress intended the statute to protect wholesalers. *See* U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 124, 137 (1977).

34 FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960).

"declared that 'a discrimination is more than a mere difference,' and exists only when there is 'some relationship . . . between the parties to the discrimination which entitles them to equal treatment.' Such a relationship would prevail among competing purchasers . . . ."[35]

The Court noted:

"It is, of course, possible that the Congressman was so intent upon the immediate problem—protection of secondary-line competition—that he did not reflect upon the significance of his statement when applied to primary-line cases."[36]

And, as the Court explained:

"The existence of *competition among buyers* who are charged different prices by a seller *is obviously important* in terms of adverse effect upon secondary-line competition, but it would be merely a fortuitous circumstance so far as injury to primary-line competition is concerned."[37]

Selling to pure wholesalers for less than retailers simply is not discriminatory;[38]

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35 *Anheuser-Busch, supra*, 363 U.S. at 547.

36 *Id.* at 553 n.24.

37 *Id.* at 546 (emphasis added).

38 Needless to say, this does not mean a supplier can cavalierly label competing buyers "wholesaler" and "retailer" and discriminate between them. However, if in fact the purchasers are on different levels of trade and do not compete, that is the end of the inquiry. FTC v. Ruberoid Co., 343 U.S. 470, 475 (1952). What the wholesaler charges its retailers is entirely the wholesaler's business, except where the supplier controls the distributor or its prices to its customers. Only in that event is the supplier "chargeable with the competitive effects of [its] distributors' prices . . . ." Purolator Products, Inc., 65 F.T.C. 8, 36 (1964), *aff'd*, Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968). As explained by leading commentators:

". . . if the middleman is entirely independent of control by the manufacturer, the prices it charges are not 'attributed' to the manufacturer, and there is no violation of the Act." Handler, Blake, Pitofsky & Goldschmid, *Cases and Materials on Trade Regulation* 1198 (2d ed. 1983).

(iii) Thirdly, where different prices are paid by purchasers reselling to different levels of trade (retailers reselling to consumers; wholesalers reselling to retailers), the requisite anticompetitive *effects* (assuming there are any) do not flow from the price difference;

(iv) And, in all events, a *bona fide* wholesaler who receives the same wholesaler price given by its supplier to all its wholesalers, is not someone who "knowingly receives the benefit of [a] discrimination" as specified in Section 2(a)—particularly where it is only after receipt, and on the basis of the wholesaler's subsequent resale pricing decisions and those of its customers, that assertions of competitive injury are made.

d. Nor may the future contemplated by the court of appeals be imputed to Congress:

— Sellers to one or more classes of trade monitor their customers' costs and resale prices and vary prices or discounts *within* a class of trade so as to prevent resale price reductions that might injure some member of a price reducer's own or its customers' class of trade;

— Sellers, becoming aware that a customer has reduced its resale prices to one or more of its own customers, promptly withdraw enough of the discount to prevent any repetition; and

— Federal courts are the forum for assessing the margin or level of profit sufficient to encourage the members of each class of trade to continue to distribute each manufacturer's products and still enable the manufacturer to be profitable.

Plainly, Congress intended no such regime. Determining what the appropriate "spread" should be between each class of trade has been left to the day-to-day judgment and negotiations of the businesses involved and the marketplace.

e. Nothing in the Robinson-Patman Act requires discrimination *within* any class of trade (retail or wholesale) on the basis of members' costs:

"The Robinson-Patman Act proscribes discriminatory pricing, not pricing which fails to discriminate between [purchasers] with unequal costs at the same level of distribution." *White Indus., Inc.* v. *Cessna Aircraft Co., supra*, 845 F.2d at 1500 n.4.[39]

f. Discriminating among members of a class of trade on the basis of members' costs would penalize efficiency. To be sure, members of a class of trade who can reduce costs may enjoy advantages over competition and may be able to reduce prices to customers, giving the customers a competitive advantage at the customers' level of trade. That should hardly be discouraged.[40]

g. Discriminating within a class of trade against wholesalers (or retailers) on the basis of "costs" could subject a supplier to Robinson-Patman Act liability to those discriminated against.[41]

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39 In *White*, the dealer urged, *inter alia*, that lower prices to distributors were discriminatory because they impaired a dealer's ability to sell to other dealers in competition with distributors. In rejecting this claim, the court observed:

> "Dealers like White who desire to compete in selling to *other dealers* will of course suffer a cost disadvantage compared with distributors, but to hold that the larger distributors' discount violates § 2(a) in this circumstance would effectively abolish two-channel distribution systems in all industries. White cites no authority for this extraordinary interpretation of the Act, nor can we find any." 845 F.2d at 1500 (emphasis in original).

40 Surely, it cannot be contemplated that a supplier have to write Distributor A:

> "Our spy advises you have brilliantly restructured your sales staff and delivery system, reducing costs by 15%. Accordingly you will now be charged an additional 15% on your purchases."

And write Distributor B:

> "We are in receipt of your affidavit attesting to the addition of another 10 worthless relatives to your payroll. An extra discount will be reflected in your next invoice."

41 *See, e.g.*, Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) (cost based price differences within same level of trade are discriminatory). This Court has had occasion to suggest that a supplier should not, to avoid one possible Robinson-Patman Act concern, become "exposed . . . to new Robinson-Patman Act claims . . . ." Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 452 n.18 (1983).

2. Preventing Independent Wholesalers and Their Retailer Customers From Passing On Lower Prices to the Public

a. The court of appeals seemingly reasoned that because Texaco did not *in fact* determine its customers' resale prices "since the antitrust laws do not permit sellers to dictate the resale prices charged by their customers," Texaco is liable for the "independent pricing decisions" made by Dompier and Dompier's customers "*as a matter of law*."[42] Respectfully, none of the cases relied upon in support of this position supports it. None involved the claim that lower prices to wholesalers than retailers would violate the Act—so none addressed the present issue: whether a *lawful* discount given all wholesalers *becomes unlawful* solely because of the independent pricing decisions of a wholesaler and its independent retailers. No case has so held. All the law, as shown above, is to the contrary.

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42 PA-15 n.8. The court's reasoning, in full text, is as follows:

> "We note that, in any event, at least two of the three 'intervening causes' referred to by Texaco—the facts that Dompier and Gull made independent pricing decisions, and that their customers did so—are inadequate as a matter of law. In essence, Texaco argues that a defendant may avoid Robinson-Patman liability simply by showing that the recipients of the unlawful discount, or their customers, independently set their resale prices. That view would preclude all Robinson-Patman claims involving secondary and tertiary line injury, since the antitrust laws do not permit sellers to dictate the resale prices charged by their customers. *E.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980). Texaco's argument is directly contradicted by a long line of Robinson-Patman cases that have found wholesalers liable for unlawful price discounts passed on to their customers. *E.g.*, Morton Salt, 334 U.S. at 37; Perkins v. Standard Oil, 395 U.S. at 642; Falls City, 460 U.S. at 428."

Morton Salt,[43] a Federal Trade Commission proceeding, involved charges of discrimination within the same class of trade and where members of the lower level (retailers) paid less than wholesalers. As already noted, *supra* p. 17, the Order, affirmed by this Court, *explicitly sanctioned* Texaco's conduct here: selling to wholesalers at a uniform wholesale price and selling to retailers at a uniform retailer price that is higher.

Perkins[44] also involved discrimination within the same class of trade and where members of the lower level (retailers) paid less than the plaintiff integrated wholesaler. After discrimination between wholesalers was found, injury was traced through the majority-owned subsidiaries of the favored wholesaler to its impact upon plaintiff at the retail level. There is not the slightest suggestion that it is illegal to sell to all wholesalers at the same price.

Falls City[45] too involved discrimination on the same level of trade—between two wholesalers. The higher price charged the disfavored wholesaler made it impossible for its retailers to compete with the favored wholesaler's retailers. Again, there is no suggestion that selling to wholesalers at a uniform price could become illegal if a wholesaler receiving a non-discriminatory price should decide to reduce prices to its customers.

The fact that Texaco believed it could not lawfully interfere with its independent wholesaler's pricing decisions or those of the wholesaler's independent retailers—and that it concededly did not interfere—cannot be a basis for imposing liability on Texaco for selling to its wholesalers at a uniform price and not discriminating among them.

b. The price at which Texaco sold Dompier when it was nothing but a wholesaler was a lawful price. So long as Dompier did not reduce its resale prices and its retail customers did not pass any portion of the reduction on to the public, there was

43 FTC v. Morton Salt Co., 334 U.S. 37 (1948).

44 Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

45 Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).

no competitive injury to plaintiffs. *See supra* pp. 8-9. The issue of whether a supplier's sales at a lawful price become unlawful when, in the normal course, the recipient of the lower lawful price passes some of the benefit along to its customers, thereby causing injury to competition at the customer level, was addressed by this Court in the context of the meeting competition defense in *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951). The reasoning is dispositive.

First, in reconciling the Robinson-Patman Act with the Sherman and Clayton Acts, the Court observed that "Congress did not seek by the Robinson-Patman Act . . . to abolish competition. . . ." 340 U.S. at 249. It then held that the lawful price obtained by Standard's gasoline "jobbers" (by reason of Standard's meeting competition defense) did not become unlawful

> ". . . merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, *in a natural course of events, reduce their own resale prices to their customers*. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level *as well as at the dealer's resale level*, whether or not the reduction to the dealer is discriminatory. * * * * We may, therefore, conclude that *Congress meant to permit the natural consequences to follow* the seller's action . . . ." 340 U.S. at 250 (emphasis added).

Here too, where an independent wholesaler in the natural course used a lawful nondiscriminatory price to reduce its own resale price to its customers,[46] it must be concluded that Congress meant to permit the natural consequences to follow.

c. Since suppliers cannot control their customers' resale prices as a matter of law, and cannot discriminate on the basis

46 The observation in F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 201 (1962) is apt:

> "For *any* lower price in favor of a distributor *always* creates a *capacity* to 'pass it on' and underprice the supplier (or other distributors) in resales to the 'retailer' level." (emphasis in original).

of customers' costs as a matter of law and fact, what alternative to ongoing massive liabilities (particularly if, as below, suing retailers obtain equality with wholesalers, threefold) is there? It does not seem far-fetched to expect that many wholesalers, in an attempt to fend off termination, will seek to assure their suppliers that they will not price aggressively in the future. However understandable, the public interest is not served by such a prospect.[47]

II. The Fact That Wholesalers Have Been Charged Less than Retailers for a Long Time Does Not Warrant an Inference That Competition Has Thereby Been Lessened

The point need not be labored. Parties and witnesses were in agreement that the retail gasoline market in Spokane remained vigorously competitive throughout the more than nine years that plaintiffs were claiming competition was lessened. Nevertheless, the courts below found it appropriate for a lessening of competition to be inferred by the jury from the fact that the wholesaler price, as must be expected, was significantly lower than the retailer price for many years. PA-11-12. Plainly, this was a misapplication of *Morton Salt*'s "self-evident" inference.

47 The principle was reiterated in Great Atlantic & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69, 80 (1979):

> "In the *Automatic Canteen* case, the Court warned against interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.' 346 U.S., at 63. Imposition of . . . liability on the petitioner in this case would lead to just such price uniformity and rigidity.[13]
>
> * * *
>
> [13] More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws. *United States v. United States Gypsum Co.*, 438 U.S. 422; *Automatic Canteen Co. of America v. FTC, supra* at 74."

334 U.S. at 50. The Act's requirements for proof of injury to competition must not be trivialized.[48]

III. In No Event May Retailers Predicate Competitive Injury and Treble Damages on the Basis of How Much Better Off They Would Have Been Had They Been Treated As Wholesalers

A. Absence of Actual Competitive Injury

Plaintiffs did not merely challenge an age-old practice consistently considered lawful—selling to all wholesalers at a uniform wholesaler price—they sought to recover treble damages therefor under Section 4 of the Clayton Act as conduct "forbidden in the antitrust laws." 15 U.S. § 15(a). As such, it was essential for plaintiffs to demonstrate that the practice actually injured competition,[49] not just plaintiffs. But with competition in Spokane thriving, there could be no serious attempt to do so. The district court refused to charge that plaintiffs had to prove an actual impact upon competition to recover damages (R. 3121-22), and the jury was instructed that plaintiffs were *not* required to establish that the alleged discrimination in price actually injured competition. JA 396-97.[50] The court of

48 As a leading commentator on the Act observed, a "focus on detrimental effects on competition, rather than a concern with individual competitors, is fundamental to a reconciliation of the Robinson-Patman Act with over-all antitrust policies." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 130 (1962).

49 This Court cautioned in FTC v. Sun Oil Co., 371 U.S. 505, 527 (1963):

> "In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission *and the courts must make realistic appraisals of relevant competitive facts*. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." (emphasis added).

50 This error alone is sufficient to warrant reversal. *See, e.g.*, Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575, 577 (Former 5th Cir.), *cert. denied*, 459 U.S. 908 (1982); O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1127-28 (1976).

appeals, disparaging as a "chestnut" (PA-10) this Court's repeated admonition that the antitrust laws in the context of Clayton Act § 4, were "for 'the protection of *competition*, not *competitors*,' "[51] concurred in plaintiffs' focusing on themselves, not competition. PA-12-15.

B. Damages Were Not Predicated On That Which Allegedly Made The Conduct Unlawful

Plaintiff retailers sought damages on the basis of the windfall profits they would have made had Texaco been ordered to treat them as a wholesaler. *See supra* pp. 9-11. However, nothing in the antitrust laws—even as construed by the court of appeals in this case—requires identical pricing to wholesalers and retailers. As explained in comparable circumstances in *Brunswick*:

> ". . . it is far from clear that the loss of windfall profits that would have accrued . . . even constitutes 'injury' within the meaning of § 4. And it is quite clear that if respondents were injured, . . . it did not occur 'by reason of' that which made the [conduct] unlawful." 429 U.S. at 488.

What purportedly made Texaco's sales to a wholesaler at its uniform wholesaler price unlawful, under plaintiffs' own theory, was that some portion exceeded the wholesaler's costs and, at times, "some portion of the discount was passed along" to plaintiffs' competitors, who in turn passed along some part of that to the public, thereby causing plaintiffs to *suffer* loss of customers or reduction in their selling price. Assuming plaintiffs were entitled to damages, it would be limited to those flowing from such loss of customers or reductions in selling prices. It would not be the windfall of hypothetical equal treatment with a wholesaler.

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51 *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis in original).

C. Under No Circumstances Should "Damages" Have Been Projected On The Basis Of Plaintiffs' Receiving All or Part of The Wholesaler Discount

Of the three equal-treatment-with-Dompier scenarios, two were based on plaintiffs' receiving all or half the wholesaler discount. *See supra* pp. 10-11. In a price discrimination claim, however, as Justice Cardozo explained in an analogous context:

> "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less."[52]

Thus, in *J. Truett Payne*,[53] the Court rejected the notion that a disfavored purchaser is entitled to recover, as "automatic damages," the amount of the price differential giving rise to an unlawful discrimination—because a purchaser simply has no right to the lower price. Under the Act, there is no violation if the seller continues to sell at the same high price to the plaintiff, as long as it ceases to sell at a lower price to "favored" purchasers. Since there would be no violation under that circumstance, a price-discrimination plaintiff cannot claim that the antitrust laws give it the right to receive the discrimination.[54]

Moreover, here, where plaintiffs' damages are based on their receiving not the price paid by their *competitors*, Dompier's customers, but that paid by their competitors' supplier, Dompier, plaintiffs' "damages" actually amounted to a discriminatory preference for themselves. In no event may that be justified as "antitrust damages." *See, e.g., Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 394 (8th Cir. 1987); *Olympia Co., Inc.* v. *Celotex Corp.*, 771 F.2d 888, 892 (5th Cir. 1985).

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52 ICC v. United States, 289 U.S. 385, 390 (1933).

53 J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981).

54 By the same token, it is the *lower* price to the "favored" buyer that a seller must justify for "meeting competition" purposes, not the higher price to the "disfavored" buyer, as this Court emphasized in *Falls City, supra*, 460 U.S. at 439 *et seq.*

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. [illegible]

FILED
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IN THE

Supreme Court of the United States

October Term, 1989

TEXACO, INC.,
Petitioner,

v.

RICKY HASBROUCK,
d/b/a RICK'S TEXACO, *et al,*
Respondents.

BRIEF OF RESPONDENTS

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September 6, 1989

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QUESTIONS PRESENTED FOR REVIEW

Texaco frames questions for review which are argumentative and not reflective of the facts presented at trial. Stated without argument, Texaco's petition raises the following questions for review.[1]

1. Where a seller knows before the sale that its wholesaler customer is reselling to retailers at a price below that which the seller charges competing direct-purchasing retailers, and direct-purchasing retailers are injured thereby, is the seller immune from liability for such injury under the Robinson-Patman Act merely because the party injured is the seller's retailer customer rather than a retailer supplied by the wholesaler customer?

2. Is the "competitive effects" element of the Act satisfied where there was a substantial, long-standing discrimination in price between plaintiffs and the favored buyers, and direct evidence that plaintiffs and others similarly situated lost sales because of the discrimination?

3. In awarding damages for a violation of the Robinson-Patman Act, may the jury consider evidence of what prices the favored and disfavored buyer would have been charged in the absence of the violation, or must the jury assume that, absent the discrimination, the supplier would have charged the favored buyer a higher price?

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[1] Respondents do not agree that these issues have been properly preserved by Texaco. *See* Argument, *infra*.

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

A. Introduction.

The facts discussed hereafter tell the following simple story. In 1972 and 1973 the public in Spokane saw Texaco-branded stations posting significantly lower prices on the street than the plaintiffs. Because the public did not know that the lower priced stations purchased gasoline below the plaintiffs' cost, their conclusion was that the plaintiffs were price gougers, "high priced." Loyal customers and friends stopped doing business with the plaintiffs because they could buy Texaco gas for less from stations that appeared no different from those of the plaintiffs. When asked to explain the differences in retail prices, the plaintiffs had no satisfactory answer because they didn't know that the competing stations bought Texaco gasoline at lower prices.

Sales volumes at the lower priced stations soared, and the plaintiffs' sales stagnated. When asked how this could be, Texaco's representatives told the plaintiffs they simply weren't trying hard

enough, that they should combat this unfair competition with more service and smiles and cleanliness. But these intangibles could not arrest the natural tendency of the consumer to follow price, especially when the product was identical. Shortly after the prices at these competing stations again approached their costs, the plaintiffs filed suit against Texaco and proved that the root cause of the disparity in retail prices was price discrimination — rank favoritism in price to large chain purchasers.

When confronted with this suit, Texaco raised numerous defenses. It said the plaintiffs had caused their own dilemma because they were full-service stations. But this was untrue; it ignored the fact that several of the plaintiffs had tried to operate as self-service stations even without a competitive buying price, and the fact that Texaco had told the plaintiffs to meet the price competition by working harder and giving better service. Texaco also said the lower price was justified by Texaco's cost savings, and was extended to meet an offer from a competitor. But cost justification was dropped as a defense, and there was no basis for the meeting competition claim. Texaco said "the price is justified by functions that the favored purchasers perform." But that also proved untrue; the favored purchasers' functions were the same as those performed by the plaintiffs. And, finally, Texaco said "your real complaint is with the unbranded market, not us." But this simply denigrated the long-standing loyalty to the brand that said "you can trust your car to the man who wears the star," and ignored the fact that Texaco secretly subsidized the unbranded competition in Spokane by selling to Gull Oil Company at huge discounts.

When these defenses were held up to the bright light of a jury's common sense, they were properly rejected. No credible reason for the rank favoritism was ever disclosed by Texaco. The jury, under proper instructions, judged Texaco's conduct and defenses and found them wanting. Now, still having no legitimate reason for its conduct, and having no comfort in the facts and instructions presented to the jury, Texaco asks this Court to grant it refuge from the law that so plainly proscribes its conduct. Today, after fourteen years and two jury trials, Texaco has no better argument.

The question before this Court is whether the district court properly denied Texaco's motion for judgment notwithstanding the verdict. There is no fact issue or jury instruction raised by the questions presented. The plaintiffs claimed and proved that competing Texaco stations bought Texaco gasoline below the plaintiffs' costs, which caused the plaintiffs to lose sales and profits. In defense, Texaco has painted a deceptively simple and misleading picture of the facts. It suggests that only legitimate, garden-variety "functional" discounts to "pure wholesalers" are involved. In fact, this case involves nothing of the kind. The price discounts here (1) were arbitrary and unjustified, (2) were substantial in size, (3) favored large chain retailers, and (4) had the direct and foreseeable effect of diverting substantial sales from the plaintiffs, (5) with Texaco's full knowledge and encouragement.

B. Texaco's Gasoline Distribution in Spokane.

The plaintiffs are twelve individuals who operated Texaco gasoline stations in Spokane, Washington. Texaco sold gasoline to them at a "retail tank wagon" ("RTW") price. Texaco also sold gasoline to two other firms — Gull Oil Company and Dompier Oil Company — at fixed discounts off the RTW price. Gull, which marketed gasoline under the "Gull" name, bought at a discount of 4¢-6¢ per gallon below the plaintiffs' cost from Texaco. JA 31-32. Dompier, which marketed under the "Texaco" brand, bought at a discount of 3.65¢-3.95¢ prior to 1977, and 2.65¢ thereafter. JA 24, 29-30. Contrary to Texaco's assertion, both Gull and Dompier sold gasoline at retail in direct competition with the plaintiffs throughout the 1972-1981 period involved in this case. Dompier also sold to other retailers who competed with the plaintiffs.

1. The Plaintiffs. Most of the plaintiffs leased their service stations from Texaco. They purchased gasoline from Texaco under written contracts which called for Texaco to deliver gasoline to their stations. They competed with other Texaco-branded stations and with other brands, including Gull.

2. Gull Oil Company. Gull operated or supplied 15 stations in Spokane during the period covered by the lawsuit. The Gull stations

included "commission" stations and "consignment" stations. In both instances Gull owned the station location or controlled it by lease. In "commission" stations, Gull sold gasoline directly to the consuming public, setting the price and paying commissions to the station operators. In "consignment" stations Gull owned the gasoline in the station's storage tanks, and title "passed" to the customer as the dealer pumped the gas into a customer's tank. Thus, Gull was retailing in direct competition with the plaintiffs throughout the 1972-1981 period involved in this action. Ex. 385; JA 96-99, 103, 504-512.[2]

Texaco referred to Gull as an "unbranded distributor." However, its contract with Texaco did not require Gull to perform any specific functions; did not limit the discount to gasoline Gull resold at wholesale; and nowhere referred to Gull as a "distributor" or a "wholesaler." The contract was terminable by Texaco at any time on six months' notice. Ex. 79. Gull had no bulk plant for inventorying gasoline, and instead delivered gasoline directly from the Texaco pipeline terminus to its retail stations. JA 379. It had only one employee in Spokane other than two truck drivers, one of whom was a part-time worker. JA 101-103.

Gull was an aggressive retail marketer, and had a policy of setting its retail prices below "major" brand prices. JA 106. It was Texaco's policy to conceal the fact that it was selling gasoline to Gull. Thus, the plaintiffs, and most of Texaco's own employees, did not know that the gasoline being sold through Gull stations came from Texaco. JA 256; R 1424, 1643.

3. Dompier Oil Company. Texaco referred to Dompier Oil Co. ("Dompier") as a "branded distributor." Texaco traditionally extended a "branded distributor" discount to wholesalers whose intended function was to inventory gasoline in their bulk plants and make deliveries out of their inventory to commercial and small retail

[2] Gull operated five commission stations from the beginning of the 1972-1981 period, and added three other commission stations in 1975, for a total of eight. Four other consignment stations were changed to commission operation in 1975. JA 504-512.

accounts, usually in rural areas, to which Texaco could not, or did not wish to deliver gasoline. The distributor discount was intended to compensate the distributor for performing these functions. Ex. 1; JA 410-411. However, Dompier's contract, like Gull's, did not require Dompier to perform any specific functions; did not limit Dompier's discount to gasoline Dompier resold at wholesale; and did not otherwise condition Dompier's right to receive the price discount. And, like the Gull contract, the Dompier contract was terminable by Texaco at any time. Exs. 81-83.

The contract required Texaco to deliver gasoline to Dompier at its bulk plant. Notwithstanding this, Texaco permitted Dompier to pick up the gasoline at the Texaco pipeline terminus, and paid Dompier a "hauling allowance" which was intended to cover Dompier's cost of transporting the gasoline from the pipeline terminus to its bulk plant. JA 27-28, 186-187, 411-413; R. 2074. In practice, however, Dompier hauled the gasoline directly from the pipeline terminus to its stations; it rarely, if ever, first delivered the gasoline to its bulk plant.[3] Although Dompier was not doing the hauling for which the hauling allowance was intended, Texaco nonetheless paid Dompier the allowance on all gasoline it purchased. JA 123-128, 189-192. Contrary to Texaco's assertion, Pet. Br. 8, the hauling allowance was of sufficient size both to cover Dompier's costs of delivering gasoline to its stations and to pay Dompier a profit. JA 126, 128.

a. Dompier's Retail Sales Through Its Own Stations. Although nominally labeled a "distributor," Dompier sold at retail throughout 1972-1981. Initially Dompier retailed through two Texaco-branded service stations owned and operated through a sister corporation, Red Carpet Car Wash, Inc., which was wholly owned by John K. Dompier (who also owned Dompier), and which had the same

[3] This would have been a futile act, because the bulk plant had only 6,000 gallons storage for premium, 10,000 gallons storage for regular and no storage for unleaded — less capacity than many of the plaintiffs' stations. JA 123-128, 189-192, 449. A delivery truck held 9,400 gallons making this storage meaningless. JA 131.

officers, directors and address as Dompier.[4] In 1974 Dompier also began to purchase and operate the retail stations it had previously supplied. Texaco encouraged Dompier to do this.[5] As a result, by the mid-1970's gasoline had become 75–80% of Dompier's total business, almost all of which was sold through retail stations which competed with the plaintiffs. JA 114-116. By 1978, Dompier was operating six Texaco retail stations plus the two "Red Carpet" Texaco stations. JA 483–503, 132–33, 119–120.

b. Dompier's Sales to Customers Competing with the Plaintiffs Pre-1974. Dompier began its relationship with Texaco as a "full-line" distributor in the early 1960's. Initially, it sold only distillates and lubricants, but in the mid-1960's it also began to sell gasoline. JA 114-115. At first Dompier performed the functions of the traditional branded distributor, selling to commercial accounts and small retail stations in rural areas. However, in response to encouragement from Texaco Dompier changed its business to the supply of several large, high-volume retail stations in Spokane. JA 74–75, 116, 424–434, 489–493; Exs. 751–755.

This was part of a program which Texaco instituted to increase its sales volume by increasing retail sales through wholesalers. The program included assisting wholesalers to start three new retail stations in the Spokane market. JA 424–434. Texaco's supervisors were instructed to become involved in the wholesaler's retail sales,

[4] JA 119–121, 139, 146–148, 150–151, 183–186. John Dompier supervised the operations of both Red Carpet and Dompier, and set both the price at which Dompier sold gasoline to Red Carpet and Red Carpet's retail price. Dompier "sold" to Red Carpet at a price 2¢-3¢ below the RTW price Texaco charged the plaintiffs. The Red Carpet stations carried the Texaco brand, accepted the Texaco credit card and sold Texaco motor oil. JA 127–128. One plaintiff, Harold Hardwick, was told by his Texaco representative that he would have to set his retail price one-half cent over his cost to compete with Red Carpet. R. 1250–51. *See also* R. 253–254.

[5] JA 116–118, 172–174, 424–434. Texaco's Spokane management encouraged Dompier to purchase more stations even if it was necessary to pay above-market prices for them, telling Dompier that "a thorn might turn into a rose." JA 173-174.

and to assist wholesalers in opening their own retail stations as a means of accomplishing the increase in sales volumes:

> With the Wholesaler you should now spend the remainder of the day determining his plans for expanding sales volume through the acquisition and/or conversion of competitive retailers and consumers. You should investigate the possibility of retail service station development through first party leases, assisting the wholesaler in selecting desirable sites.
>
> It is extremely important for supervisors to determine prospective competitive accounts which the Wholesaler is presently soliciting. He should render any possible assistance by accompanying the Wholesaler on actual sales calls, assisting in the solicitation. JA 444.

This program had remarkable results in Spokane in 1972 and 1973. Dompier dramatically increased its sales by passing on all or most of its price discount from Texaco to the Texaco branded stations it supplied. Dompier sold to the stations at prices 2.65 to 3.45 cents below plaintiffs' cost from Texaco. JA 329–338; R 809–810; Exs. 471, 791, 788, 789, 792, 800, 804. Dompier's customers then used their lower price to sell at lower retail prices which were often barely above plaintiffs' cost. JA 267–270, 329–338.

The pass-through of the Texaco price discount to Dompier's stations dramatically altered the retail marketing of gasoline under the Texaco brand in Spokane. Between 1970 and 1972, Dompier's monthly volume of gasoline sold at the retail level tripled. JA 487. Whereas Dompier's customer stations averaged sales of 25,000 gallons a month in 1970, in 1972 they averaged 65,000 gallons a month. JA 487. By the first six months of 1975, Dompier's eight stations were outselling 19 stations which Texaco supplied directly by more than 70,000 gallons per month. JA 488. It only remained for Dompier to complete the destruction of the plaintiffs' market by acquiring the stations it supplied and using its entire wholesale discount at the retail level. JA 132–133, 151–154.

Texaco knew that its effort to increase sales volume was being accomplished by Dompier's pass-through of its discount to its

customers, who in turn posted lower retail prices. A Texaco sales supervisor testified that Texaco knew in 1971 that Dompier was passing on its discount and that its customers were posting prices several cents below direct-buying retailers. JA 329-337, 233-234. Another Spokane sales supervisor observed:

> . . . large growth in volume occurred with our Distributor in 1972. This was primarily due to the type of retailing done by accounts supplied by Dompier. By and large, Dompier switched from supplying traditional full serve accounts to complete self serve operations based on price retailing.

JA 489. A Texaco vice president for marketing admitted that other wholesalers also passed on the discount:

> Some wholesalers are selling retailers at significant discounts to assist them in being competitive at the pump and maintaining volume, often taking the hauling allowance and little more as their wholesale profit.

JA 478. In Spokane, Texaco's personnel referred to Texaco's dual pricing system in Spokane as a "two-headed snake" which, because of the discount, was causing the plaintiffs to lose sales to distributor stations. JA 268-271.

c. *The Dompier Retail Stations.* The stations which Dompier operated and supplied all carried the "Texaco" brand and were authorized to accept the Texaco credit card. They were not all self-service stations, as suggested by Texaco.[6] Some of the stations were self-service stations, and at others attendants pumped the gasoline. JA 155, 163-164. There were no differences in appearance or operation between the plaintiffs' stations and the Dompier stations. JA 379; CR 89. The stations, like the Gull stations, competed directly with the plaintiffs. R 1483-84; JA 265-269; Exs. 27, 794.

[6] Nor were the plaintiffs' stations all full-service stations, as Texaco suggests. JA 55-56; R. 253, 317-319, 403-404.

C. Texaco's Discounts to Gull and Dompier Were Not "Legitimate Functional Discounts" or Uniform Discounts to "Pure Wholesalers."

Gull and Dompier received lower prices simply because Texaco gave them the "distributor" label.[7] Texaco's assertion that the facts showed only "uniform" and "legitimate" "functional discounts" to "pure wholesalers" is a hypothetical construct which is far removed from reality.

1. The Discounts Were Not "Pure Wholesale" Discounts. Texaco's management personnel testified that a distributor who was retailing should not receive a distributor discount. JA 67-68. But they also acknowledged that, in practice, the fact that a distributor was retailing was irrelevant to whether he received the discount. JA 69-70, 79, 220-21, 338. Texaco had no objective guidelines or periodic reviews for determining whether a "distributor" was truly selling as a wholesaler or performing distribution functions, JA 338, and Texaco's wholesale sales manager knew of no instance when Texaco discontinued a discount because a "distributor" was no longer a true wholesaler. JA 68. Since Texaco gave Gull and Dompier the discounts on gasoline they resold at retail, there is no basis for Texaco's assertion that its discounts were pure wholesale discounts.

2. The Discounts Were Not Based on Functions Performed. The discounts also were not "functional discounts." Neither the Gull nor the Dompier contract conditioned receipt of the discount on, or otherwise required performance of any functions. The issue of whether Gull and Dompier performed wholesale functions was vigorously contested at trial, and resolved against Texaco, and the trial court and court of appeals both found there was abundant

[7] There were no relevant differences between the requirements of the plaintiffs' contracts and the Gull and Dompier contracts. The principal differences were (1) the price discounts to Gull and Dompier, and (2) the fact that the plaintiffs had to pay C.O.D., whereas Texaco extended credit to Gull and Dompier. Compare Ex. 661 with Exs. 79, 81.

evidence that Gull and Dompier performed few, if any, functions which the plaintiffs did not also perform.

For example, Gull functioned almost entirely as a retailer and, except for the delivery function, performed no functions and had no costs which the plaintiffs did not perform or have. Dompier had abandoned the role of inventorying gasoline and distributing it in small loads to commercial or small retail customers, and it needed none of the discount to cover the cost of delivering gasoline to its stations because the hauling allowance fully covered that cost plus a profit.[8] Aside from this delivery function, for which it was compensated, Dompier performed no functions and had no costs different from those of the plaintiffs. This was true both when Dompier resold at retail[9] and when it resold at wholesale to retail stations. Dompier's ownership of a bulk plant, although nominally a traditional wholesale function, was irrelevant to its sales to or through retail stations because Dompier did not need the bulk plant, and rarely if ever used it to deliver gasoline to the retail stations. JA 122-126, 187, 189-192. Moreover, when selling at wholesale to other retailers, Dompier performed no other functions, such as counseling dealers; aside from delivering gasoline (for which it received the hauling allowance), its sole "function" was to take the stations' telephone orders for gasoline and pick up their payments. JA 157.

Texaco knew Dompier was not performing the functions for which the distributor discount was intended. Indeed, it observed the same phenomenon in other locations besides Spokane. Texaco's vice-president, now its Chairman, observed:

> For many years, we have sold gasoline to distributors at a discount of approximately 3½¢ per gallon from the price charged

[8] Texaco's vice-president testified that distributors like Dompier who hauled gasoline straight from the pipeline to retail stations abused the function of the hauling allowance. R. 2075. *See also* JA 408-412.

[9] Dompier's president acknowledged that Dompier needed no wholesale salesman to "sell" gasoline to itself, had no wholesale credit risks in "selling" to itself, and had no inventory or administrative expenses different from those of the plaintiffs. JA 156.

> our independent retailers. This discount was traditionally justified by the many important services distributors performed when they physically "distributed" this gasoline among many customers, most of whom required small volume deliveries. These traditional functions continue to be performed by most of our distributors operating in rural areas, who serve various farm and other small volume accounts including service stations. . . . On the other hand, urban distributors have significantly changed their methods of operation over the past few years. . . . These distributors are shedding many of their traditional functions and have concentrated their sales in very high volume outlets. This has reduced their per gallon overhead cost to the point where a good portion of the discount is not being utilized to defray their costs of distribution at all.
>
> In addition to this traditional discount, many of these distributors have been obtaining added savings through the manipulation of their hauling allowance. . . . This amount can provide a significant marketing advantage to a distributor when he is not, in fact, incurring the cost of hauling the gasoline to his bulk facility.

JA 410-413. This description of retail sales by distributors was presaged by Texaco's program to increase such sales started in the early 1970's.

Texaco's vice-president for U.S. sales also acknowledged that distributors were abandoning their traditional functions. JA 343-344. He testified that there was no logical rationale for the price to a distributor to be keyed to the RTW price since different distributors provided different services, and had urged Texaco to adopt a "distributor tankwagon" pricing system under which a distributor's entitlement to a discount would depend on the services he performed. JA 340-344. However, Texaco changed nothing in response to his recommendations. Indeed, in 1976, Texaco questioned whether Dompier was performing wholesale functions but renewed Dompier's distributor contract anyway. R. 1087-89; JA 447-448. There was ample evidence to support the jury's rejection of Texaco's argument that its discounts to Gull and Dompier were "legitimate functional discounts."

3. The Discounts Were Not Available to Others Similarly Situated. Wholesale functions or classifications were also irrelevant to Texaco's pricing because Texaco refused to make discounts available to other purchasers who were willing and able to perform the same functions as Gull or Dompier, or who resold in the same way as Gull and Dompier. A discount based on a purchaser's performance of distribution functions should logically be available to any purchaser willing to perform the same functions. Likewise, a discount based on a buyer's "class of trade" (*i.e.*, the nature of the customer's reselling) should be available to all buyers who resell in the same way. Here, neither was the case. Although Gull and Dompier performed no functions other than to deliver gasoline (and Texaco paid Dompier separately for performing this function), Texaco refused to extend a discount to the plaintiffs when they wanted to haul their own gasoline. JA 38-41, 59. And although Gull and Dompier received the discount on gasoline they resold at retail, Texaco refused to extend the discount to other retailers. The discounts had no basis other than mere favoritism.

4. The Discounts Were Not "Uniform Wholesale Discounts." In its petition for certiorari, Cert. Pet. 5 n.4,7,9, Texaco represented that it charged uniform prices to wholesalers. Texaco and its supporting *amici* treat this alleged fact as controlling on the issue of liability, arguing that "compliance with the Act is assured" by this practice, Pet.Br.17, and that charging wholesalers uniform prices provides a necessary "safe harbor" for sellers. Pet.Br. 14, 16-17; U.S. Br. 16. At trial, Texaco never even raised this "uniform wholesale prices" argument. Therefore, evidence of Texaco's pricing to other wholesalers was not at issue and was not put into the record. However, the little evidence that is in the record on this issue indicates that Texaco's contention that it charged uniform prices to wholesalers is not true,[10] and discovery in the case confirmed this.

[10] Texaco had other wholesalers called a consignee and a tank truck dealer in Spokane, each of which was charged different prices. *see, e.g.*, Ex. 178, and Texaco's wholesale sales manager testified that distributors did not receive the same discount. JA 71. Texaco did not even charge the same distributor a uniform price. For instance, Texaco gave Gull and Dompier additional temporary discounts for some stations and not others depending on the competitive conditions in the area of the retail station. R. 799-805; Exs. 27, 50, 132-135, 495, 498; JA 450-474.

For instance, a 1974 "Texaco Distribution Data Sheet" marked as Exhibit 73 (but not offered into evidence) showed that one distributor in the Spokane District paid 35.75¢ per gallon while another paid 31.25¢; that distributors in the same state had different discounts; and that wholesale discounts in the Portland Region ranged from 3.6¢ to 4.5¢ off RTW.

Thus, if charging a uniform price to wholesalers is significant to the issues in this case, the record was not developed and could not have been developed. If the significance of the issue is that uniform prices are charged to *competing* wholesalers to avoid price discrimination claims by other wholesalers, such a record likewise was not developed and did not exist here. Gull and Dompier were both wholesalers in Spokane, but were charged different prices. And if Texaco is referring to uniform prices only to competing *branded* distributors, there were no competing branded distributors here. Texaco had only *one* branded distributor (Dompier) in Spokane. Indeed, Exhibit 73, discussed *supra*, shows that Texaco had only two other branded distributors in the entire Eastern Washington/Northern Idaho area. One was located in Yakima, Washington, approximately 200 miles from Spokane. The other was located in Pierce, Idaho, a rural area in the Clearwater Mountains north of Weippe three to four hours from Spokane. Finally, at trial, Texaco never claimed that it gave Dompier discounts because of a uniform pricing system installed to avoid price discrimination claims.

Charging uniform wholesale prices, even if true, has no significance for purposes of the Robinson-Patman Act where the seller also sells directly to retailers. However, if Texaco is now contending that it does, and that it charged all wholesalers the same price or gave them all the same discount, it should affirmatively so state to the Court. A decision by this Court should not be based on an assumed fact which has not been addressed, established, or preserved as a defense.

D. Texaco's Price Discrimination Caused Sustained and Substantial Injury to Plaintiffs and to Competition.

The Gull and Dompier stations were located close to the plaintiffs' stations, on or near the same traffic arterials. Exs. 27, 385, 513, 177, 794; App. B.[11] R 396-399, 730-731, 650, 1190-1194, 1438-1441. Because of its relatively small geographic size and the pattern of its streets, Spokane has substantial cross-city traffic, and there was competition among stations over relatively broad areas. JA 244, 283-291; R. 498, 1715-1721, 2908-2909, 1824, 2918-19. Gasoline prices in Spokane tended to move citywide. JA 104-106.

Because of their lower buying prices, the Gull and Dompier stations posted retail prices substantially below the plaintiffs' prices. Gull's policy was to price below the major brand stations, and at levels comparable to aggressive marketers, including Dompier. JA 106, R. 708-09. The Dompier stations usually priced below any competing stations, and Dompier was considered by Gull to be one of the two most aggressive marketers of gasoline in Spokane. JA 106-107. There was extensive testimonial and documentary evidence that the stations owned or supplied by Dompier, because of their price discount, often sold at retail prices barely higher than the RTW price the plaintiffs had to pay Texaco. Exs. 471, 654-657A, 800, 804, 791, R 315, 1250-51, 253-254, JA 166-167, 330-332. Dompier's president testified that Dompier would have been forced to increase its stations' retail prices if Texaco had removed its price discount, R. 853-854, and that a plaintiff could not post prices at Dompier's level because, if he did, "he would probably go out of the gasoline business." JA 166-172.[12]

Although it was impossible to prove where all of the plaintiffs' former or potential customers bought their gasoline, the plaintiffs

[11] Appendix B is a map of Spokane which identifies the locations of the plaintiff, Gull and Dompier stations.

[12] As an example, from Dompier's own records he calculated that in November 1975 Dompier made a gross profit of $7,567.83 on the sale of 162,749 gallons of gasoline at its Freya Street station, but that a plaintiff who tried to sell at the same retail price as the Dompier station could only have made a gross profit of $1,139.24. Ex. 909; JA 166-172.

produced many Spokane residents who testified that they discontinued purchases from the plaintiffs because the Dompier stations had lower prices.[13] In addition, several of the plaintiffs could identify specific customers lost to Dompier because they observed the customers in the Dompier stations, saw Dompier credit card invoices in customers' automobiles when servicing them, or because disgruntled former customers complained that the plaintiffs' prices were higher than Dompier station prices. JA 268; R. 238-243, 315-318, 401-403, 530, 600-01, 657-58, 1558, 1244-45, 1285.

The results of this competitive situation were dramatic. Between 1970 and 1975, Dompier's monthly sales volume almost tripled (from 155,152 gallons to 462,956 gallons), while Texaco's monthly "throughput" gallonage in Spokane (*i.e.*, gallonage sold to Texaco dealers such as the plaintiffs) fell from 569,269 gallons to 389,557. Ex. 215, JA 487-503; R. 1089-1090. Whereas Dompier accounted for only 20.7% of the Spokane District monthly retail volume in 1970, only four years later its share had grown to almost 50%. JA 483, Ex. 215. The share of independent retailers, however, declined from 76% to 42%, *id.*, and the plaintiffs' sales either declined or showed little or no growth. JA 483-503; Exs. 128, 374, 645, 648-657, 709-721. Eight Dompier stations were outselling 19 independent dealers, and by 1978 seven of the 13 plaintiffs' stations had closed. JA 483-500; Exs. 709-721. Similar growth occurred with the Gull stations. Between 1973 and 1976 (the years for which complete Gull volume data was available), Gull's retail volume increased 87%. Exs. 762-764, 769.

E. Texaco Knew Its Price Discrimination Was Injuring The Plaintiffs.

Texaco misleadingly pictures itself as an unknowing and helpless victim of independent pricing decisions by Gull and Dompier.

[13] Appendix A to the plaintiffs' brief in opposition to the petition for certiorari sets forth a summary of the competitive injury evidence. *See also* R. 473-480, 634-640, 1154-1158, 1170-1174, 1329-1332, 1343-1346, 1353-1355, 1535-1539, 1593-1597, 1601-1605.

This is far from the truth. As shown *supra*, Texaco actively encouraged and helped Dompier to change its business to retailing, knowing that the discount was Dompier's means of doing so. Numerous exhibits and witnesses, including Texaco's own management employees, confirmed that Texaco knew its pricing practices were injuring retailers such as the plaintiffs, both on a local and a national level.

For example, Texaco's vice-president, now its Chairman, stated that Texaco distributors were not performing wholesale functions, and that "a good portion of the [distributor] discount is not being utilized to defray [distributors'] costs of distribution at all." JA 410-412. He concluded that *the distributor discount was the cause of the independent retailers' losses:*

> We believe that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance. We believe that they are inconsistent with the realities of gasoline marketing today.

JA 407-413. A Texaco marketing department report concluded that direct-buying retailers could not compete effectively against distributor retail stations even if they converted to full or partial self-service operation. JA 475-480. And another Texaco vice-president admitted that the distributor discount was the "root cause" of "rampant and alarming" increases in sales at distributor stations at the expense of direct-buying dealers. JA 213-215, 217-218, 222-223, 227, 232; Ex. 2, JA 414.

In Spokane, Texaco's officials knew the distributor discounts were being passed on to retail stations, and drew the identical conclusion about the effects. A Texaco sales representative stated that Dompier had a marketing advantage over independent retailers "with which they cannot compete." JA 483-493. Another Texaco sales representative said the Dompier stations were the plaintiffs' principal competition, and that the plaintiffs could not compete with those stations due to Dompier's discount. JA 265-267, 331-337. However, when the plaintiffs repeatedly complained to Texaco about

the prices of the Dompier stations, JA 268; R.1555, 734-735;[14] and asked Texaco how the Dompier stations could price so low, Texaco's sales representatives lied in response, saying they "didn't know why. . .couldn't understand it." R. 401-404.

While hiding the truth from the plaintiffs, Texaco's management personnel in Spokane knew the price discrimination was the cause of the plaintiffs' losses. Texaco's Spokane management referred to Texaco's dual-distribution pricing in Spokane as a "two-headed snake" and believed that "sooner or later Texaco was going to have to make a decision as to which method of marketing they wanted to pursue" because "they [the two methods] were in conflict." JA 268-271.[15]

F. Plaintiffs' Damages Evidence.

The law entitles a plaintiff to recover the sales and profits he would have gained had there been no discrimination. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981). Plaintiffs presented the testimony of an economist, Dr. Keith Leffler of the University of Washington, who was uniquely qualified to testify in this case.[16] Dr. Leffler studied the Spokane market, the

[14] The plaintiffs did not complain to Texaco about the prices at the Gull stations since Texaco concealed the fact that it sold gasoline to Gull. *See, e.g.*, JA 256, R. 1424, 1643.

[15] Why Texaco failed to address the problem was unclear, at least to Texaco's Spokane personnel. The evidence indicated that one reason was Texaco's desire to increase its overall sales volume, even at the expense of independent dealers such as the plaintiffs. Exs. 11-14. An ex-FTC official suggests the reason was that Texaco was unfairly profiting from economic price discrimination. Celnicker and Seaman, *Functional Discounts, Trade Discounts, Economic Price Discrimination, and the Robinson-Patman Act*, 1989 Utah L. Rev., Vol. 4 (forthcoming Nov. 11, 1989).

[16] Dr. Leffler had served as chief economist for the FTC's study of the effects of the proposed merger of Standard Oil of California and Gulf Oil Company on wholesale and retail gasoline markets. R. 1699-1700, and as an economist in antitrust litigation brought by the Northwest states and others involving gasoline marketing. In connection with the latter case, he had studied the wholesale and retail gasoline market in Spokane before he was engaged in this case. R. 1700-1702.

trial testimony and exhibits, and relevant data, including data on the sales volumes and prices of the plaintiffs, Dompier and Gull. Based on that study, he concluded that the plaintiffs had been injured — *i.e.*, lost sales and profits by reason of Texaco's price discrimination in favor of Gull and Dompier.

Plaintiffs did not, as Texaco suggests, Pet. Br. 9, claim injury only from Dompier. There was substantial evidence of the significant price advantage enjoyed by Gull and the large volumes of gasoline it sold at lower retail prices in competition with the plaintiffs. Exs. 762-769; JA 106. Having proven the fact of their injury by reason of Texaco's discrimination in favor of both Gull and Dompier, Dr. Leffler measured the damages by utilizing available data for the plaintiffs' stations and four of the Dompier stations. His analysis focused on the four Dompier stations simply because insufficient price and volume data was available for other stations.[17].

Throughout its brief, Texaco misstates the basis of plaintiffs' claims for damages pre-1974. For example:

> the premise [of plaintiffs' damages] being that plaintiff retailers were entitled to price parity, not with the wholesaler's retailer customers, but with the wholesaler itself. (Pet. Br. 3).
>
> . . . For purposes of damages, plaintiffs did not claim they were entitled to be treated like Dompier's customers, their alleged competitors, but rather like Dompier itself . . . (Pet. Br. 9).
>
> . . . They did not predicate damages on the average . . . price reduction received by any Dompier customer . . . (Pet. Br. 10).

[17] JA 105-106. Comparison of the plaintiffs' stations and the four Dompier stations was reasonable and, if anything, conservative since Texaco gave Gull a considerably larger discount than Dompier, and Gull's own experience was that Gull needed only a one-cent price advantage to compete on a level footing with major brands. R. 703-704.

This assertion is wrong. The damage calculations for pre-1974 were based on the discount Dompier gave its customers, Ex. 804, *not* on the discount Texaco gave Dompier.[18]

Dr. Leffler did not measure the plaintiffs' damages merely by reference to the amount of the discrimination. As required by *J. Truett Payne*, he determined the sales and profits the plaintiffs would have gained if Texaco had not discriminated in price against the plaintiffs. R. 1736-47. The evidence showed that Texaco had considered eliminating the discrimination either by raising the distributor price, lowering the plaintiffs' price, or by a combination of the two. JA 480-481. Therefore, to determine damages Dr. Leffler had to consider what the plaintiffs' and the Gull and Dompier stations' buying prices would have been absent the discrimination. JA 296-300. Since the plaintiffs' sales were affected both by the level of the Gull and Dompier stations' retail prices, and by the level of the plaintiffs' own retail prices, Dr. Leffler also considered how the Gull and Dompier stations and the plaintiffs would have reacted in their retail pricing in response to an elimination of the discrimination. R 1738-1740, 1774-1776.

Using the best available data, Dr. Leffler performed a statistical regression analysis to determine the actual effects observed in the market (1) of changes in the retail prices of the four Dompier stations on the plaintiffs' sales, and (2) of changes in the plaintiffs' retail prices on the plaintiffs' sales. Using these observed effects, he

[18] In describing the price used for the damage calculation pre-1974, Dr. Leffler stated:

> . . . prior to July 1975 I used the supplied stations' price differential . . . . And prior to the allocation period it is a pass-on of whatever price differential was paid by the supplied stations, which is about two and a half cents.

R. 1797. Again when describing the price used in the damage analysis (Ex. 5551), Dr. Leffler said:

> Q. That would be Dompier's buying price then, that column? A. Well it is — before July 1975, no, it is the buying price of the stations he supplied. Q. Okay. A. And then after July '75 it is his buying price.

R. 1891. *See* R. 2131.

calculated the sales and profits which the plaintiffs would have gained in the absence of Texaco's price discrimination. *See* Section IV-C, *infra*. In so doing, he did not limit himself to the artificial assumption (argued by Texaco) that Texaco would have eliminated the discrimination *only* by raising Dompier's price by the full amount of the discrimination. Rather, consistent with *J. Truett Payne*'s admonition that damages are to estimate "what plaintiff's situation would have been in the absence of defendant's antitrust violation," 451 U.S. at 566, Dr. Leffler calculated damages by taking into account the three possible ways that Texaco considered to eliminate the discrimination, and the ways the four Dompier stations and the plaintiffs from the evidence would have reacted to the elimination of the discrimination. R. 1737-1740, 1749-1773, Exs. 913-918. The resulting damages were very conservative; they represented an average of only $5,486.59 for each plaintiff for each year of the plaintiff's operation, and an increase of only several customers per day. R. 2928-32, Ex. 932.

G. **Proceedings Below.**

The jury's verdict was the second verdict for the plaintiffs in this case, which has now been pending almost 14 years. At the second trial, Texaco defended its price discrimination factually, on the basis of "wholesale functions" performed, cost justification, and meeting competition. Texaco abandoned the cost justification defense before the case was submitted to the jury, JA 364-365, R. 2814, 3321, and the jury rejected the functions and meeting competition defense after Texaco presented its evidence on those issues.[19]

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[19] Plaintiffs nowhere conceded, as Texaco contends, that the jury's verdict must be reversed if Texaco's discounts were lawful in any portion of the damage period. Pet. Br. 12. Texaco disingenuously relies on a statement of plaintiffs' counsel which related to the Texaco lawyer's proposed closing argument on the meeting competition defense. The United States rejected Texaco's assertion as incorrect, and observed that "[plaintiffs'] concession . . . was explicitly limited . . . to the 'meeting competition' defense during a portion of the damage period. *See* TR 3165-66." U.S. Cert. Br. 16.

SUMMARY OF ARGUMENT

1. Texaco argues that a manufacturer which gives uniform discounts to purchasers who resell at wholesale must, as a matter of law, be exempt from the Robinson-Patman Act because a manufacturer will otherwise have to monitor its purchasers' costs, control their resale prices, and expose itself to wholesalers' price discrimination claims. There is no evidentiary foundation for this argument; Texaco's wholesale prices were not uniform, and Texaco recognized that it had several ways to eliminate the discrimination which were neither burdensome nor unlawful. Moreover, where a manufacturer is selling both to retailers and wholesalers, a "safe harbor" for charging uniform wholesale prices is a meaningless standard when judged in terms of the Act's language and purposes. Merely charging uniform prices to different wholesalers, particularly where some perform few, if any, wholesale functions, is no assurance that competition will not be injured, and is really not uniform pricing at all.

2. Texaco's proposed *per se* exemption for price discounts granted to wholesale resellers would require judicial amendment of the plain language of the Robinson-Patman Act. Under the Texaco rule, the size of the discount, its duration and its competitive effects would not matter. And the exemption would apply regardless of whether the discount satisfies the statutory cost justification defense; regardless of whether the recipient performs any functions which the manufacturer would otherwise perform; regardless of whether the discount is available to others who perform the same functions; and regardless of whether the discount, with the seller's knowledge, is passed on to retailers who thereby gain a competitive advantage against direct-buying retailers. Such an exemption contradicts the plain language of the Act; its unique purpose to provide small merchants equal competitive opportunities as far as price is concerned, *FTC v. Sun Oil Co.*, 371 U.S. 505, 520, (1963), and the heavy presumption against the creation of implied exceptions to the Act's application. *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 12 (1976).

3. Neither this Court nor the Federal Trade Commission has implied the kind of exception Texaco seeks. Economic substance and the existence of adverse competitive effects, not labels or the form of transactions, determines the legality of discriminatory pricing. *FTC v. Ruberoid Co.*, 343 U.S. 470, 475 (1952). The Act applies to discriminations in price between purchasers who do not compete, or who are at different levels of the distribution chain, if the discrimination causes the adverse competitive effects which are the touchstone of the statute. *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969).

4. This case does not present the broad issue Texaco raises. At most, it raises only a much narrower question involving the application of the Act to wholesale discounts where the supplier, before the sale, had actual knowledge that the discount would be passed on to retailers who thereby gain a competitive advantage over direct-buying retailers. Moreover, the jury's verdict was proper on the independent ground that Gull and Dompier competed directly with the plaintiffs as retailers.

5. No issue relating to the district court's jury instruction based upon *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), is properly before the Court. Texaco raised no objection to the instruction in either the district court or the court of appeals. Moreover, the logic of the *Morton Salt* inference of competitive injury applies regardless of whether a price discount was first granted to a wholesaler who passes it on to a competitive retailer. The jury was not required to accept the inference, and there was abundant evidence in the record to support the jury's finding that Texaco's price discrimination adversely affected competition.

6. In proving damages, a plaintiff may recover the sales and profits he would have made "absent the violation." *J. Truett Payne*, 451 U.S. at 565. He is not limited to the artificial assumption that the supplier would have cured the violation only by raising the price charged the favored buyer, as Texaco contends. Texaco considered eliminating the discrimination by raising the distributor price, lowering the RTW price, or a combination of the two. The jury appropriately decided, as a fact issue, how Texaco would have eliminated the discrimination, and awarded damages accordingly. This was entirely consistent with *J. Truett Payne* and did not amount to an award of damages in the amount of the discrimination.

ARGUMENT

I. The Petition Should Be Dismissed, or the Judgment Affirmed, Because This Case Does Not Present the Issue Texaco Raises.

Texaco complains that legitimate, garden-variety wholesale discounts are threatened by the court of appeals' statement that the Act may be violated if a wholesale discount is not cost-based and all or a portion of the discount is passed on to customers who compete with direct-buying retailers. Benign, garden-variety wholesale discounts were not involved here, and the court of appeals' result was correct with or without the questioned language. If the Court granted Texaco's petition to examine application of the Robinson-Patman Act to legitimate functional discounts, the petition should be dismissed, or the judgment affirmed, because this case does not present that issue.

A. Gull and Dompier Sold at Retail.

Because Gull and Dompier sold at retail throughout the damages period, the issue Texaco raises, and Texaco's argument, are not significant to the outcome of this case. In their first brief filed before certiorari was granted, the Justice Department and Federal Trade Commission reached this precise conclusion. U.S. Cert. Br. 16. They observed that "the jury may well have found liability on the theory that Dompier and Gull themselves competed with [the plaintiffs]," and that "there is no reason to believe . . . the verdict as to [Texaco's] liability would differ if this Court were to reverse and remand for a third trial." *Id.* at 17.

By failing to address the issue of Gull and Dompier's retailing, Texaco and the United States concede Texaco violated the Act when

it gave Gull and Dompier discounts on gasoline they resold at retail in direct competition with the plaintiffs. This conclusion is required by *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952), in which the Court held the Act applicable to wholesale discounts where the "wholesalers" *in fact* functioned as retailers. The Court held that the Federal Trade Commission was correct to disregard "ambiguous labels, which might be used to cloak discriminatory discounts to favored customers . . . ." *Id.*[20]

Recognizing this, Texaco strains to create a different issue by suggesting that the evidence showed only wholesale resales prior to July 1974. To make this argument, Texaco (1) conveniently ignores the evidence of Dompier's pre-1974 retailing through the Red Carpet stations, and of Texaco's extensive involvement in Dompier's expansion of its retail business; and (2) improperly casts aside the uncontested evidence of Gull's retailing throughout the damages period, claiming it was not really a part of plaintiffs' case, and "without present significance." Pet. Br. 6. But the plaintiffs presented substantial evidence of injury arising from Texaco's discounts to both Gull and Dompier. JA 283-286, R. 1738, 1292-1293, 1360-1361. The district court's instructions show clearly that the plaintiffs claimed damages for both, and the issue of liability for sales to Gull was presented to the jury. The plaintiffs were not required to measure their damages only by using data from Gull stations, particularly where, as here, sufficient data from the Gull stations was lacking.[21]

[20] *See Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); Monograph: *The Robinson-Patman Act: Policy in Law, Volume I*, 59 (ABA, Section of Antitrust Law 1980); Schniderman *Price Discrimination in Perspective* (ALI/ABA 1977) ("the competitive realities govern, not the manufacturer's internal terminology. . . .").

[21] The record cited by Texaco to establish Gull's asserted irrelevance supports the contrary conclusion. Plaintiffs proved injury from Gull. R. 1711, 1713-1717, 1733, 1778, 1964-1965, 3061-3063. However, because there was not sufficient Gull data to measure the amount of damage, the amount of damage was limited to that measured by the four Dompier stations for which data existed. Having established the fact of injury, the plaintiffs were entitled to prove their damages by good and reasonable inference since, otherwise, the wrongdoer would profit by his own wrong. *J. Truett Payne*, 451 U.S. 565-566, quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946).

Because Gull and Dompier were retailers in direct competition with the plaintiffs, the judgment can and should be affirmed irrespective of the outcome on the "wholesale discount" issue raised by Texaco.

B. Texaco's Discounts Were Not Functional Discounts.

The practice of extending legitimate functional discounts is not threatened, or even presented by this case. Texaco's discounts were not conditioned on the performance of wholesale functions. They were extended even though Gull and Dompier performed few, if any, wholesale functions, and were not made available to others willing to perform the same functions. Moreover, there was a complete absence of evidence that the discounts were justified by cost savings to Texaco, as would be expected in the normal wholesale situation. Legitimate functional discounts were not involved here. Moreover, the issue of whether Texaco's discounts were legitimate functional discounts was a fact issue which the jury resolved against Texaco, and which cannot serve as the basis for review in this Court.[22]

[22] The Justice Department and FTC apparently do not embrace the proposed *per se* exemption for sales to wholesalers as strongly as Texaco and the other *amici*. They carefully argue only for exemption of "legitimate" functional discounts. U.S. Br. 15, n.11. But this concept wholly ignores the statutory test of whether the discount adversely affects competition. So long as the recipient of the discount "performs *some* services for the supplier" (emphasis added), under the Government's test the inquiry is ended, regardless of the size of the discount, its effect on competition, or its lack of availability to other customers.

Moreover, the Government's definition of "legitimate" functions describes "wholesale" functions which were in fact performed by the plaintiffs to the same, if not more significant extent than they were performed by Gull and Dompier. The functions said to legitimize the discount are "physically delivering products on resale, managing inventory, or assuming credit risks not performed by firms further down the chain of distribution." Here, the delivery function was paid for by Texaco as a separate item from the discount. With respect to managing inventory, the record shows that the plaintiffs had more gasoline and product inventory than Dompier and Gull. JA 36, 122-123, 449; R. 309, 391-392, 449. And both plaintiffs and Dompier assumed credit risks. Thus, the question of whether the discount is "legitimate" is a question of fact to be resolved by a jury. It cannot be decided as a matter of law given the U.S. definition of "legitimate."

C. Texaco's Discounts Were Not Class of Trade Discounts.

Nor is the practice of extending uniform "trade discounts" to all customers who resell in the same way (*e.g.*, wholesale resellers and retail resellers) presented here. Texaco's prices to wholesale resellers in Spokane were not uniform, and Texaco gave Gull and Dompier "wholesale" discounts even when they resold at retail, while refusing to give the same discounts to other retailers.

D. Issues of Uniform Prices and Wholesaler Costs Were Not Involved.

Since the practice of charging uniform prices to wholesale customers was not an issue at trial, the record also does not appropriately raise the issue of whether uniform prices to wholesalers provide a "safe harbor" from the Robinson-Patman Act when a manufacturer also sells directly to retailers. This is especially true because the little evidence on this issue in the record indicates that Texaco did not charge uniform prices to wholesalers. Similarly, the language in the court of appeals' opinion which Texaco and the Government find objectionable does not involve any dispositive issue. Nothing in the district court's jury instructions predicated liability on findings concerning the costs of Gull or Dompier.[23]

E. The Issue Raised By Texaco and the Government Ignores the Central Facts Relevant to Texaco's Liability, and Is Not Raised In This Case.

Even assuming, *arguendo*, that prior to 1974 Texaco extended the discount only to Dompier acting as a pure wholesaler, the issue Texaco poses is far broader than the actual basis for Texaco's liability in this case. The jury instructions permitted a finding of liability

[23] The Ninth Circuit's language concerning whether the discounts were "cost based" was a response to Texaco's factual argument that wholesale functions performed by Gull and Dompier absorbed the discrimination so that it was not the cause of any impact on the retail level. The courts below responded to this argument by stating that Texaco did not attempt to prove, in any quantitative sense, that the cost of the functions precluded any impact on competition.

based upon Texaco's sales to Dompier as a wholesaler *only* if the jury found that Texaco had *knowledge, before the sale*, that the discount would be passed on to customers competing with the plaintiffs. JA 392-393.

The Justice Department and FTC, in their initial brief, told the Court that this case does *not* present the issue Texaco raises:

> [W]e do not think that this case on its facts presents the broad issue that petitioner discusses (whether a supplier must show that its discounts to wholesalers relative to retailers are cost based). The case instead presents the narrower question whether a supplier, with *actual knowledge* that its wholesaler discount is being passed through and is conferring a competitive advantage on the retailers that are in competition with directly supplied retailers, may be held liable for the resultant competitive injury. . . . The decision below, when read in this limited fashion, does not conflict with the holding of any other court of appeals.

U.S. Cert. Br. 12-14. Indeed, in their initial brief, the Justice Department and the FTC rejected Texaco's statement of the question presented, and restated the issue to add the critical facts of (1) Texaco's knowledge and (2) adverse competitive effects:

> Whether a supplier that offers uniform prices to purchasers at the same level of the distribution chain may be liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), *if the supplier is aware* that an independent wholesaler passes on to retailers a portion of the discount that it receives from the supplier, thereby undercutting the price that the supplier offers directly to retailers *and placing the supplier's retailer customers at competitive disadvantage.*[24]

U.S. Cert. Br. (I) (emphasis added). The Justice Department and FTC did not disagree with the lower court result on this issue. *Id.* at 13-14.

The FTC's position in the initial brief was consistent with its decisions in *Doubleday & Co.*, *Mueller Co.*, and *Boise Cascade*

[24] In their second brief, the FTC and Justice Department deleted the italicized language from the "questions presented," as discussed *infra*.

Corp.,[25] which recognized that proof of competitive injury is the critical factor in applying the Act and refused to adopt a *per se* exemption for wholesale discounts. However, after certiorari was granted, the FTC and Department of Justice reversed their position and urged a *per se* exemption. For reasons that are not explained, their second brief changed the statement of the question presented as set forth in their first brief by *deleting* reference to (1) Texaco's knowledge before the sale of the passing on of the discount, and (2) the resulting competitive injury — the very facts they considered most relevant in their first brief.

The Government's deliberate disregard of these facts in its second brief, and its revision of the question to eliminate them, raise a legitimate question as to the weight to be given the brief and the commitment of the FTC to uphold the spirit and letter of the Act it is supposed to enforce. It also demonstrates that the abstract question posed by Texaco is not properly framed by this record, as the Government itself recognized in its first brief.[26]

[25] *Doubleday & Co.*, 52 FTC 169 (1955); *Mueller Co.*, 60 FTC 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *Boise Cascade Corp.*, 107 F.T.C. 76 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988).

[26] By deleting competitive injury from its question presented, the FTC and Justice Department need not address (1) the actual competitive injury suffered in this case; (2) the plain language of the statute proscribing competitive injury caused by "customers" of the favored buyer; (3) the underlying premise of *Doubleday*, *Mueller*, and *Boise Cascade* that the competitive injury component of the proof is highly probative of the Act's application; and (4) the Congressional intent to protect small businessmen from customer level injury. If one focuses on the proof of competitive injury in this case, which in the past has been so important to the Commission, the brief of the United States and the Federal Trade Commission is simply schizophrenic. It simply reads the words "customers of either of them" out of the Act.

The failure to address the significance of Texaco's knowledge of the pass-through of the discount is equally disingenuous. By leaving this fact out of the question presented, the FTC and Justice Department can ignore it in their argument. This is necessary if they are to argue for a *per se* immunity on this record, since they recognized in their first brief that there is no justification for exempting a manufacturer from liability

(footnote continued on next page)

The FTC's current position urging a *per se* exemption stands in marked contrast to that expressed by the thirty-five states that have filed as *amici* in opposition to Texaco. The FTC's concern is with the claimed administrative problems of the price discriminating seller, a concern not expressed in the Act. The states' concern is for the competitive injury suffered by the victim of price discrimination, the very heart of the concern expressed in the Act.

F. The Facts of This Case Do Not Present a Recurring Problem.

The facts here are unique, and are unlikely to recur with any regularity. "[M]arket forces should tend to discourage a supplier from offering independent wholesalers discounts that would allow them to undercut the supplier's own retail customers." U.S. Cert. Br. 15. Moreover, legitimate wholesalers will not ordinarily be able to pass on discounts if they are truly performing the distribution functions for which the discount was intended, and in such instances a manufacturer should be able to claim the statutory "cost-justification" defense. The paucity of cases which have even presented this fact pattern disproves Texaco's claim of a widespread problem. The FTC and the Department of Justice correctly observed in their initial brief that "this case appears to reflect rather anomalous behavior on the part of the supplier," U.S. Br. 17, and that there is an "absence of any reason to believe that the facts of this case are representative of a widespread 'problem' . . . ." U.S. Br. 17.

G. Texaco Has Not Adequately Preserved the Issue It Presents.

At trial, Texaco proposed an instruction based on *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). Texaco's instruction stated that the Act applies where wholesale discounts are passed on to retail customers who thereby gain a competitive advantage over direct-buying retailers. App. A. Texaco objected to the district court's jury instruction, which conformed to Texaco's proposed instruction, only

for the known consequences of its price discrimination. U.S. Cert. Br. 13–14. In their first brief the FTC and Justice Department stated that the judgment below could be justified on the basis of "the narrower rule that a supplier must mitigate the known downstream effect of a passed-through wholesaler discount." *Id.*

on proximate cause grounds, an inherent factual issue. R. 3107-3109. Accordingly, Texaco has waived any objection to liability for sales to wholesale resellers. *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

H. The Petition Should be Dismissed.

Because this case does not present the issue Texaco raises, *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969); does not involve a conflict of authority, *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931); is supported by valid grounds unrelated to Texaco's argument, *The Monrosa v. Carbon Black Export*, 359 US. 180, 183 (1959); *Jones v. State Board of Education*, 397 U.S. 31, 32 (1920); and there is serious question whether Texaco even properly raised the issue it presents, *City of Springfield v. Kibbe*, *supra*, the Court should dismiss the petition as improvidently granted, or summarily affirm the judgment below.

II. Texaco's Discounts Were Not Exempt From Scrutiny Under the Robinson-Patman Act.

A. Texaco Seeks A Per Se Exemption Which Would Contravene the Act's Language and Purposes, and Prior Decisions of this Court.

1. The Act's Language and Purposes.

The language of the Robinson-Patman Act is simple and straightforward:

> it shall be unlawful . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be substantially to lessen competition . . . *in any line of commerce*, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, *or with customers of either of them*. . . . (Emphasis added.)

15 U.S.C. 13(a). The Act nowhere mentions an exemption or special treatment for functional or wholesale discounts. Congress adopted

only two defenses to the general prohibition of the Act's language — cost justification and meeting competition — neither of which applies here.

Congress specifically rejected a proposed defense for pricing based on functional levels when the Act was first passed.[27] Even the functional pricing exemption proposed at that time required the seller's prices to be justified under the statute's cost justification defense:

> Differentials between purchasers in each classification as set forth in the above exemption must, of course, be justified by difference in cost as provided by subparagraph (2) below [the cost justification provision of the statute].

H.R. 2287, 74th Cong. 2d Sess. 9 (1936). *See* W. *Patman, Complete Guide to the Robinson-Patman Act*, 298 (1963).

> The bill neither requires nor compels the granting of discriminations or differentials of any sort . . . It leaves any who wish to do so entirely free to sell to all at the same price regardless of differences in cost, or to grant any differentials *not in excess of such* differences.

Id. at 298 (emphasis added). Before final enactment Congress deleted the proposed functional pricing exemption, leaving the statute's general language and the two statutory defenses. Since then, Congress has repeatedly rejected similar proposals.[28] Thus, the statutory language nowhere supports an exemption for pricing

[27] The original Robinson and Patman bills stated that "nothing herein contained shall prevent differentials in prices as between purchasers depending solely upon whether they purchase for resale to wholesalers, retailers, or to consumers . . . ." H.R. 8442, 74th Cong., 1st Sess., June 11, 1935. The House deleted the proposed functional discount exemptions in response to strong opposition, and the House language was adopted as § 2(a) in conference. *See* 3 Kintner, *Federal Antitrust Law* § 19.2 (1983).

[28] Recent legislative proposals would have required price differences based upon the nature of a buyer's reselling, or would have required greater discounts to wholesalers than to retailers. *See* Hearings on H.R. 3465, H.R. 4151 and H.R. 4529 ("Recent Efforts to Amend the Robinson-Patman Act") (Antitrust Subcomm., House Comm. on the Judiciary,

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by trade or functional levels, and the legislative history reveals that Congress expressly rejected such an exemption.[29]

The Robinson-Patman Act is unique in that Congress' aim was specifically to preserve equal competitive opportunities for small independent merchants faced with competition from larger chain retailers. *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963); *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948). The Act is not generally concerned with the promotion of competition and the efficient allocation of economic resources.[30] "Because the Act is remedial, it is to be construed broadly to effectuate its purposes," and there is a "heavy presumption" against implicit exemptions to its application. *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 12

August 30, 1961); Hearings pursuant to H. Res. 66, Vol. 2 ("Small Business and the Robinson-Patman Act") (Special Subcom. on Small Business and the Robinson-Patman Act of Select Comm. on Small Business, February 4-6, 26-27, March 3-4 and 11, 1970); Hearings Before Ad Hoc Comm. on Antitrust, The Robinson-Patman Act and Related Matters ("Recent Efforts to Amend or Repeal the Robinson-Patman Act," Parts 1 and 2) (House Committee on Small Business, November 5-6, 11-12 and 19, 1975; December 10-11, 1975; and January 26-27, 1976). *See also* H.R. 2170, 88th Cong., 1st Sess. (1963) and H.R. 12562, H.R. 12688, 94th Cong., 2d Sess. (1976), which would have amended § 2(a) of the Clayton Act to provide for mandatory functional discounts. All were rejected.

[29] This legislative history indicates that Congress intended that "the legitimacy of the practice [of extending functional discounts] depends upon the absence of competitive effects or the presence of the conventional defense, *e.g.*, cost justification." Monograph, *The Robinson-Patman Act: Policy and Law*, Vol. 1 at 58 (ABA Section of Antitrust Law 1980). *Accord*, Calvani, *Functional Discounts Under The Robinson-Patman Act*, 17 Boston Col. Indus. & Comm'l L. Rev. 543, 546 (1976).

[30] A current member of the Federal Trade Commission has observed that

> "... [T]he act is not generally concerned with the promotion of competition and the efficient allocation of economic resources. The Robinson-Patman Act is not an "antitrust" act. The conventional concern for efficiencies in production, distribution and marketing that underlies the antitrust laws in general have no paramount significance in this Act."

Calvani, *supra* n.29, at 547. "Thus, while its sister 'antitrust acts' are generally thought to protect competition, the Robinson-Patman Act was drafted and enacted to protect a certain group of competitors." *Id.* at 547, n.20.

(1976). Texaco provides no basis for casting aside this heavy presumption in the facts of this case.

Application of the statute to a dual-distributing seller is neither novel nor unanticipated. In fact, Congress was specifically concerned with situations where dual-distributing sellers sold to large retailer customers at lower prices than to wholesalers, because such discrimination impaired the competitive opportunities of small retailers supplied by the wholesalers. *FTC v. Morton Salt*, 334 U.S. at 43. But nothing in the Act's language or history limits an injured merchant's rights under the Act only to situations where it is a *retailer* who receives the lower price, or to situations where a small retailer purchasing from a *wholesaler* is the injured party. "[N]either the scope nor the intent of the statute was limited to [the] precise situation or set of circumstances" with which Congress was concerned, *Sun Oil Co.*, 371 U.S. at 520. "The Act is of general applicability and prohibits discriminations generally. . . ." *Id.* at 522. "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source," *id.* at 520, and "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Abbott Laboratories*, 425 U.S. at 12; *FTC v. Broch & Co.*, 363 U.S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

2. "Functional Discounts" Are Judged By Reference to the Statutory Language.

The language of the statute clearly makes a discrimination actionable where, as here, the effect of a discrimination is felt at the level of the favored purchaser's customer. To hold otherwise, as Texaco proposes, would require the Court to judicially amend Section 2(a) of the Robinson-Patman Act to delete the words "or customers of either of them." No court has ever suggested that this is appropriate. To the contrary, this Court, the FTC and lower courts have recognized that the statutory language and defenses adopted by Congress fully accommodate legitimate functional discounts, without deferring completely to suppliers' labels or a customer's level of reselling, as Texaco proposes.

The FTC has never treated a buyer's trade or functional classification as a *per se* legal defense. It has consistently treated a buyer's functional classification as either a fact relevant to the effect of the discount on competition, or has judged the validity of functional discounts by reference to the statutory cost justification defense. For example, in *Doubleday & Co., Inc.*, 52 F.T.C. 169 (1955), the Commission held that application of the Act to functional discounts depends not on the buyer's functional classification but on the factual issue of whether the size of the discount is reasonably related to the costs of the function actually performed. In *Mueller & Co.*, 60 F.T.C. 120 (1962), the Commission held that even if a functional discount is reasonably related to expenses assumed by the buyer, it can cause competitive injury, and the Act can apply, because the favored buyer can derive substantial benefit to his own business in performing the distribution function. 60 F.T.C. at 127. In its most recent case, *Boise Cascade Corp.*, 107 F.T.C. 76 (1986), *rev'd. on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988), the Commission reaffirmed the *Mueller* holding, and noted that legitimate functional discounts should be protected from liability under the cost-justification defense. The Commission stated that it is the seller's — not the buyer's — costs which provide the basis for the defense. 107 F.T.C. at 211-212.

While *Boise Cascade* did not involve a claim based upon a wholesaler's passing on of a discount, the Commission refused to establish a *per se* exemption in that situation.[31] Lower courts and this Court have similarly held that the Act may apply to discriminatory prices charged to different levels of the distribution chain.[32] This is true both where a direct-buying retailer receives the lower price, *FTC v.*

[31] The FTC said only that "There would *ordinarily* be no violation of the Act if a dual distributor receives the wholesaler discount only on the goods it resells to other dealers . . ." 107 F.T.C. at 215 (emphasis added). Apparently the Commission used the word "ordinarily" to recognize that in some circumstances injury to competition can arise even where the wholesaler only resells at wholesale.

[32] *Calvani, supra* n.29, at 547 ("the appropriate inquiry is whether injury to competition results"); Monograph, *The Robinson-Patman Act; Policy in Law*, Vol. I at 59 (ABA Section of Antitrust Law 1980.)

Morton Salt Co., 334 U.S. at 41,[33] and where the direct-buying retailer paid a higher price, as was the case here. *Perkins v. Standard Oil Co.*, 395 U.S. 642; *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).[34]

Texaco is essentially arguing that the Act requires an analysis of whether a discrimination affects competition only at the "discrimination" stage — *i.e.*, whether competition between the two purchasers is affected — and that competitive effects on the level of the purchasers' customers are to be ignored. This Court squarely rejected such an argument in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). The Court held that if competitive effects were to be analyzed at the "discrimination" stage, "every legal controversy over any price difference would shift from the detailed governing provisions — 'injury,' 'cost justification,' 'meeting competition,' 'etc.' — over into the 'discrimination' concept for *ad hoc* resolution . . . ." 363 U.S. at 551. The Court concluded that such a result would be unworkable and inconsistent with the Act's purpose, and that the "discrimination" required by the Act is nothing more than a difference in price. 363 U.S. at 551, n. 20.

In *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), the Court explicitly recognized that competitive injury, not a customer's level in the distribution chain, determines the statute's application. A manufacturer gave promotional allowances to Fred Meyer, a large retailer, but not to other retailers supplied by wholesalers. Fred Meyer argued that there was no violation of the Act because the competing

[33] *See also Jones v. Metzinger Dairy, Inc.*, 334 F.2d 919, 924-25 (5th Cir.), *cert. denied*, 379 U.S. 965 (1965); *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 701-02 (9th Cir. 1964); *Krug v. International Tel. & Tel. Co.*, 142 F. Supp. 230, 235 (D.N.J. 1956); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (1976), *cert. denied*, 429 U.S. 1097 (1977); *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942, 950-51 (D. Conn. 1966); *Curtiss Candy Co.*, 44 F.T.C. 237 (1947), *order modified*, 48 F.T.C. 161 (1951).

[34] In *Standard Oil Co. v. FTC* the Seventh Circuit affirmed an order of the Federal Trade Commission prohibiting discounts to jobbers where the discounts affected competition with direct-buying retailers either because the jobbers themselves sold at retail or passed the discount on to their retail customers, finding that the requisite competitive effect could occur even though the direct purchases were on a different level of distribution.

retailers were not "customers" of the manufacturer, even though it was they who suffered the effects of the manufacturer's discrimination. The Court refused to adopt such a narrow reading of the word "customer" in Section 2(d) of the Act, finding it "wholly untenable when viewed in light of the central purpose of § 2(d) and the economic realities with which its framers were concerned." 390 U.S. at 349.

The Court recently confirmed the primacy of the Act's focus on competitive effects in *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). There, a manufacturer charged different prices to wholesalers who did not compete at all. However, the wholesalers' retailer customers did compete with each other. Because the favored wholesaler passed its discount on to its retailer customers in the form of a lower price, competition between the retailers was adversely affected. The Court squarely held that "[t]he competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchasers; it also encompasses the injury to competition between their customers . . . ." 460 U.S. at 436.

In *Perkins v. Standard Oil Co.*, 395 U.S. 642, the Court applied the Act in precisely the situation presently before the Court. Standard Oil sold gasoline to Perkins, a direct-buying retailer, at higher prices than those charged Signal, a wholesaler. Signal sold to another wholesaler, which then sold the gasoline to Regal, a retailer which competed with Perkins. Signal's discount was passed on to Regal, which thereby gained a competitive advantage over Perkins.

Perkins raised the issue of whether the Act applies to cases of "fourth-line" injury — *i.e.*, where the wholesaler's discount has been passed on to a retailer two steps removed from the original recipient. Before even addressing this question, the Court declared that if the discount had been passed on directly from Signal to Regal — exactly the situation involved here — a "clear violation" would exist:

> [T]o read "customer" more narrowly in . . . [§ 2(a)] than we did in the section involved in *Meyer* would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain. Had Signal . . . sold its gas directly to the Regal stations, giving Regal stations a competitive advantage, there would be no question . . . that a clear violation of the Robinson-Patman Act had been committed.

395 U.S. at 647.

The Court went on to hold that fourth-line injury is actionable under the statute, and that any limitation of the Act only to third-line injury (where the discount is passed on from the wholesaler to a retailer) "is wholly an artificial one and completely unwarranted by the language or purpose of the Act." 395 U.S. 647.

> . . . Here, Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act.

395 U.S. at 647–48.[35] The test is whether the discrimination is the proximate cause of the injury, which is a factual determination for the jury. *Id.* at 648.[36]

[35] Texaco's suggestion that *Perkins* was addressing discrimination within the same class of trade, or where the direct-buying retailer paid less than a wholesaler, simply finds no support in the Court's opinion. Nor is there any basis for the Government's suggestion that the Court viewed *Perkins* as a wholesaler itself, or based its opinion on the fact that the two purchasers after the wholesaler were partially owned by the wholesaler. Indeed, Justice Marshall, concurring in part and dissenting in part, specifically objected to the Court's refusal to base its opinion on the more narrow theory that Signal was directly competing with Perkins because it partially owned Regal and the intervening wholesaler. 395 U.S. at 651.

[36] Recent opinions of this Court confirm the continued viability of the principles enunciated in *Perkins*. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *Abbott Laboratories v. Portland Retail Druggists Assn*, 425 U.S. 1, 11–12 (1976). In *Abbott Laboratories*, the Court cited *Perkins* for the proposition that "Robinson-Patman, in particular [is] to be construed liberally, and that the exceptions from [its] application are to be construed strictly."

In 1976, Congress considered legislation to amend or repeal the Act. In hearings, Congress was told about the holding of *Perkins v. Standard Oil Co.* by former FTC Chairman Earl W. Kintner. Hearing Before Ad Hoc Comm. on Antitrust, The Robinson-Patman Act and Related Matters

(footnote continued on next page)

3. "Independent Pricing Decisions" By Customers Do Not Preclude Application of the Act.

Texaco contends that independent pricing decisions by the favored buyer negate, as a matter of law, the causal connection between a seller's price discrimination and the injury to competition where the effect of the discrimination is felt at the customer level. If this were true, the Act would have little or no application. In any case of second-line or third-line injury, the existence of adverse competitive effects will depend upon whether the favored purchaser chooses to use its discount to reduce its resale price. In *Falls City*, for example, the price discrimination was actionable only because the favored wholesaler first chose to pass the discount on to its customers, and its customers then chose to reduce their retail prices. 460 U.S. at 434. As *Perkins, Falls City* and *Fred Meyer* all indicate, the question under the statute is not how a buyer resells, but whether there is a causal connection between the price discrimination and competitive injury. That factual issue was properly resolved in the plaintiffs' favor here. *Perkins*, 395 U.S. at 647-48.

B. Compliance With the Act is Not Burdensome or Impossible or In Conflict With The Sherman Act.

1. **Texaco Had Lawful and Practical Options to Eliminate the Price Discrimination.**

A dual-distributing manufacturer's own self-interest will ordinarily protect it from claims of the kind represented by this case, since it should ordinarily have no legitimate incentive to extend wholesalers discounts of a size which will injure directly-supplied

("Recent Efforts to Amend or Repeal the Robinson-Patman Act - Parts 1 and 2") at 244-245 (House Comm. on Small Business, 94th Cong., November 5, 6, 11, 12 and 19, 1976). With the holding of the Court in *Perkins* as part of the legislative history, Congress refused to repeal or amend the Act. Texaco would thus have this Court overrule its precedent where Congress has refused to do so.

The rule of *stare decisis* is particularly strong in situations of statutory construction, especially where Congress has refused to adopt interpretations or limitations urged on the Court. *Patterson v. McLean Credit Union*, 491 U.S. ____, 105 L. Ed. 2d 132, 148-149 (1989).

retailers. However, if a supplier observes over a sustained period of time that wholesalers are not using the full discount, but are passing it on to retailers who use it to the disadvantage of direct-buying retailers, the manufacturer has several reasonable and lawful options for complying with the Act. The manufacturer can, for example, (1) raise the wholesaler's price, (2) reduce its price to direct-buying retailers, or (3) do a combination of the two.

In 1976-77, when Texaco eventually admitted that its discount was severely impacting direct-buying retailers, JA 407-414, Texaco considered these options and others as well, including adoption of a pricing system based on services performed, and counseling wholesalers to return to the performance of the wholesale functions which had formerly justified the distributor discount. JA 230-234, 417-423, 477-482. None of these alternatives, available to any supplier, requires a supplier to control resale prices, monitor costs, or abandon sales to wholesalers.

2. **Application of the Act Does Not Make Sellers Responsible For Conduct Over Which They Have No Control.**

Texaco also complains that if the Act is applied to dual-distributing sellers, the seller will not know about a problem in its pricing structure in time to correct it, and that the seller should not be responsible for the pricing decisions of its customers. This abstract premise also ignores the facts of the case before the Court. Other lawsuits similar to this had been filed against Texaco well before this case was brought, so Texaco could hardly have been taken by surprise by complaints about its pricing system in Spokane.[37] Moreover, Texaco *knew* the discount was being passed on to Dompier's customers, and in fact it could hardly fail to know it, since it was obvious from the retail prices posted by Dompier's customers

[37] *See, e.g., Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.) *cert. denied*, 408 U.S. 928 (1972); *Stanton v. Texaco, Inc.*, 289 F. Supp. 884 (D. R.I. 1968); *McCaskill v. Texaco, Inc.*, 351 F. Supp. 1332 (S.D. Ala. 1972); *Cadigan v. Texaco, Inc.*, 492 F.2d 383 (9th Cir. 1974). Like *Hasbrouck*, the cases were not defended on the basis of the legitimacy of the discount, but on the failure to prove sales interstate commerce, meeting competition, and failure to prove lost sales and profits.

stations.[38] Texaco's Spokane sales representative testified to management discussions as early as 1971 about the fact that Dompier was passing the discount on to its customers, who were undercutting the plaintiffs' retail prices. JA 268-269, 331-334.

Thus, the argument that a supplier should ordinarily not be liable for the downstream effects of differential pricing ignores the fact that knowledge by the seller was required. Moreover, in the real world a wholesaler can only pass on a significant part of a price discount for a significant period of time if the discount is unduly large in relation to the functions the wholesaler is actually performing. It is the unjustified size of the discount which *in fact* causes the injury. Here the jury could find Texaco liable only if it found all of the elements of a violation and that Texaco knew *before the sale* that the discount would be passed on to the disfavored purchaser's competitor. If the price discount is so great as to satisfy all of these requirements, and Texaco knew of the conduct before the sale, then it is logical to conclude that the unreasonable magnitude of the discount is the cause of the disfavored purchaser's injury. The seller has complete control over the magnitude of the discount

3. Sellers Do Not Have To Monitor Wholesale Costs.

If a manufacturer's discount to a wholesaler is truly designed to compensate the wholesaler for performing functions which the manufacturer would otherwise perform, the manufacturer will necessarily have a good idea of the costs of performing those functions. Thus, the manufacturer should be able to establish a functional discount in a realistic and reasonable amount, and will have a natural incentive to do so. The cost-justification defense fully protects a manufacturer who sets his price in this manner.

Moreover, the fact that compliance with the Act may impose some burdens on the seller — for example, the burden to verify that wholesalers are in fact performing wholesale functions — does not justify a blanket exemption from the Act. This Court has recognized

[38] For example, when the Dompier-supplied station on Monroe Street opened in 1971, the retail price posted by the Dompier station was $\frac{7}{10}$ of a cent above plaintiff Hank Riggs' cost. *Id.* 44.

that implementation of Congress' purpose may place affirmative burdens on sellers to determine the nature of their customers' conduct. *Abbott Laboratories v. Portland Retail Druggists Ass'n.*, 425 U.S. 1, 20-21 (1976).

Furthermore, a dual-distributing seller can comply with the Act simply by focusing on the impact of his differential pricing on competition in the retail market. If the seller observes, or from complaints or market sources learns, that direct-buying retailers are being affected by inappropriate wholesale discounts, as Texaco observed in Spokane, the seller can and should adjust the price to eliminate the injury, and in fact should have every incentive to do so even absent the Robinson-Patman Act. A purchasers' costs are relevant only to the extent they may eliminate the effect of a discrimination by absorbing it.[39]

4. Sellers Will Not Have To Abandon Dual Distribution.

Although the FTC has applied the Act to preferential wholesale discounts ever since its *Doubleday* opinion 34 years ago, and this Court decided *Perkins* more than 20 years ago, the parade of horribles envisioned by Texaco has not occurred. Manufacturers still engage in dual distribution, and have not abandoned wholesalers or refused to sell directly to retailers. U.S. Br. 20. Although a true system of equal prices for all purchasers performing the same functions would promote marketing efficiencies far better than Texaco's rigid system of trade discounts, it is by no means required. Here, Texaco continued its dual distribution even after it knew of adverse claims by direct-buying retailers, and recognized that it could comply with the Act simply by adjusting its prices. It saw no overwhelming difficulties in doing that, and there are none.

[39] Since Texaco need not adjust wholesaler prices based on individual wholesaler costs, Texaco's stated concern about exposure to wholesalers' Robinson-Patman suits is misplaced. It is worthy of note that concern about wholesaler suits did not prevent Texaco from discriminating in price between Gull and Dompier.

C. *Texaco's Proposed Per Se Exemption for "Uniform Wholesale Prices" is a Formalistic Standard Which Would Reward Inefficiencies and Facilitate Avoidance of the Act's Purposes.*

Texaco and the Government argue that where a supplier sells to both retailers and wholesalers, a *per se* exemption is necessary as a "safe harbor" or "firm line" for suppliers who charge uniform prices to wholesalers. Such a "safe harbor" is meaningless in terms of the Act's language and purposes. In the "reverse trade discount" situation (*e.g., Morton Salt*), to which Texaco and the Government concede the Act applies, the supplier presumably charges all wholesale resellers the same price. But the Court has nonetheless recognized that the proscribed customer-level effects of differential pricing between wholesalers and direct-buying retailers may be present, and that if they are, the Act applies. There is no logical distinction which justifies ignoring the same kind of effects, on the same kind of competitor, just because it is a *direct-buying* retailer, rather then a retailer buying from a wholesaler, who was injured.

The district court and court of appeals both recognized, as has the FTC, that a supplier's functional discounts will ordinarily present no problem of a Robinson-Patman violation because they will be justified under the cost justification defense and will not produce adverse competitive effects. PA-9; PB-3. But it is not the fact of price uniformity which is responsible for the absence of adverse effects. If a supplier extends all wholesale resellers the same discount, the uniformity of the discount is meaningless where, as here, some or all of the wholesalers do not perform the functions which justify the discounts, or if the size of the discount bears no relation to the functions they do perform. The adverse effect on direct-buying retailers is the same. Here, for example, the effects on the plaintiffs would not have differed if Texaco had given other distributors and Dompier the same discount. The proposed safe harbor for "uniform wholesale prices" is a "meaningless mechanical word formula" unrelated to practical realities, of a kind which this Court has repeatedly rejected. *FTC v. Sun Oil Co.*, 371 U.S. 505, 526 (1963).

The competitive injury standard which Congress adopted as the touchstone of Robinson-Patman liability facilitates the Act's policy and purposes by precluding artificial distinctions which would otherwise limit or (as Texaco proposes) completely eliminate the reach of the statute. A *per se* exemption for wholesale discounts, which completely ignores the competitive effects test, "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." *Perkins*, 395 U.S. at 647. For example, a manufacturer could favor particular customers simply by having them supplied through "wholesale distributors" who do nothing more than receive and pay invoices, with the manufacturer drop-shipping to the favored customer. Or the manufacturer could give a wholesaler selling to favored customers a large discount unrelated to functions performed, knowing that the wholesaler will pass on the the discount to the favored recipient.[40] Both occurred here, and both can have enormous competitive effects, as the facts of this case show. Neither result was intended by the language or spirit of the Act.

Texaco's argument is based on its own ideas of sound economic philosophy rather than an application of the statute. As such, it is irrelevant to the Court's function. Congress had sound reasons for enacting a statute to protect small, independent merchants such as the plaintiffs. Although this policy may be considered unwise, or bring with it some inefficiencies, that is a choice for Congress, not the courts, to make. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951, 4956 (June 26, 1989). The court is not free to apply or not apply the Act on the basis of its own economic predilections. *Sun Oil Co.*, 371 U.S. 505, 519.

[40] For example, assume that in this case, Texaco had given Gull and Dompier a discount of 25¢ per gallon. No one would seriously contend that such a discount is justified, even if it were given uniformly to all wholesale customers (but not the plaintiffs). Its adverse effects on the plaintiffs would be obvious. Yet if the argument of Texaco and the *amici* were adopted, the discount would be wholly exempt from the scrutiny of the Act.

> We are not interpreting a broadly phrased constitutional provision but rather a narrowly worded statutory enactment with specific prohibitions and specific exceptions.

Id. at 528. Where, as here,[41] Congress has repeatedly rejected statutory amendments to do what Texaco proposes, the Court "will not now achieve the same result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it. . . . [T]hat is a question of policy for Congress." *FTC v. Ruberoid Co.*, 343 U.S. at 479. *See also Falls City Industries, Inc. v. Vanco Beverage*, 460 U.S. 428, 436 (1983) ("The determination whether to alter the scope of the Act must be made by Congress, not this Court . . . .").

Moreover, there is no sound economic basis for a rule permitting manufacturers to set prices to different categories of resellers without regard to competitive effects. As this case plainly demonstrates, no relationship necessarily exists between the method of a customer's reselling and marketing functions performed. Retailers as well as wholesalers should be encouraged to vertically integrate if they can efficiently do so. A formalistic exemption based on the character of a customer's reselling, however, would stifle vertical integration since direct-buying retailers could never qualify for price discounts no matter how many distribution functions they performed. Nor would such an exemption promote wholesaler efficiency or integration, because the wholesaler's entitlement to a discount would not depend on his performance of any particular functions. What incentive would a wholesaler have to become more efficient or take on new functions if he continues to receive a discount irrespective of whether he performs wholesale functions, and irrespective of whether the discount bears a reasonable relationship to the functions he does perform? As this case shows, the wholesaler's incentive in such a situation is to *abandon* wholesale functions (because there is no consequence to him) and to enlarge his market share and profits at the expense of direct-buying retailers by (1) passing the discount on to retailer customers, or (2) himself selling at retail, using the discount to gain an unfair competitive advantage.[42]

[41] *See* note 28, *supra*.

[42] A former official of the Federal Trade Commission has characterized Texaco's discounts to Gull and Dompier as unjustified trade discounts.

(footnote continued on next page)

III. The Courts Below Properly Applied the Morton Salt Inference of Competitive Injury.

In *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, this Court held that a persistent and substantial price discrimination gives rise to an inference of competitive injury sufficient to support a prima facie case under the Act. Texaco argues that the district court's jury instructions improperly permitted the jury to infer competitive injury under *Morton Salt*. P. Br. 28-29. This argument is an afterthought which was not raised in the courts below, and therefore is not properly before this Court. *City of Springfield v. Kibbe*, 480 U.S. at 259. Texaco did not object to the district court's jury instruction based on *Morton Salt*, R. 3111, and did not assign any error to the instruction in the court of appeals. Indeed, Texaco's brief in the court of appeals nowhere mentions, much less discusses, *Morton Salt*.

The district court's instruction was, in any event, proper. *Morton Salt* holds "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." 334 U.S. at 46-47. The logic of this inference applies not only where the competitive effect is felt at the level of the favored and disfavored purchasers, but also where it is felt at the level of their customers, even if the favored and disfavored purchasers are not themselves in competition. *Falls City*, 460 U.S. at 436. If the disfavored buyer in fact competes with the recipient of the discount, he suffers the same competitive disadvantage which the Court identified in *Morton Salt* irrespective of whether the favored buyer is a wholesaler and the other a retailer. To hold otherwise would honor form over substance.

rather than legitimate functional discounts. He concluded that no special protection should be extended to trade discounts, since they are often manifestations of economic price discrimination, stifle efficient innovation in distribution, and create perverse economic incentives. A. Celnicker and B. Seaman, *Functional Discounts, Trade Discounts, Economic Price Discrimination and the Robinson-Patman Act*, Utah L. Rev. 1989, Vol. 4 (forthcoming Nov. 11, 1989).

Boise Cascade Corp. v. Federal Trade Commission, 837 F.2d 1127 (D.C. Cir. 1988), does not cast doubt on application of the *Morton Salt* inference here. To the contrary, the court found that "[t]he *Morton Salt* inference is . . . alive and well in the law," 837 F.2d at 1139, and was "properly relied upon . . . to establish a *prima facie* case of competitive injury." *Id.* at 1146 n.16. The court remanded the case to the FTC for further proceedings because there was no evidence that disfavored buyers had lost sales to Boise, *id.* at 1135, 1145, and because the Commission had not considered evidence which Boise offered to rebut the *Morton Salt* inference of competitive injury under the Act. *Id.* at 1144-46. Here, unlike in *Boise Cascade*, there was direct and substantial evidence of injury to competition and displaced sales, and Texaco had ample opportunity to introduce evidence to show that competition was not affected by its discrimination.

IV. The Damage Award In This Case Met The Standards Of *J. Truett Payne Co. v. Chrysler Motor Corp.*

A. The Jury Was Properly Instructed on Injury to Competition.

The district court instructed the jury that to prove a violation, the plaintiffs had to establish that the discrimination in price had a reasonable "probability" of substantially lessening competition.[43] Texaco asserts the district court should have charged the jury that plaintiffs had to prove an actual injury to competition. In *J. Truett Payne*, 451 U.S. 557, 561-562, this Court stated that the Act is violated if there is a showing that "the effect of such discrimination may be substantially to lessen competition." Thus, a plaintiff need show only "a reasonable possibility that a price difference may harm competition." *Falls City*, 460 U.S. at 434-35 (citing *Corn Products Refining Company v. FTC*, 324 U.S. 726, 742 (1945)). The instruction was correct under these precedents.

[43] Instruction 21, which was the elements instruction under the Act, in fact, held plaintiffs to a higher standard of *probability*, not possibility.

B. The Jury Was Properly Instructed on Proximate Cause.

Texaco complains that it should not be liable for the pricing decisions of Dompier and its customers. This is a question of proximate cause which was appropriately submitted to the jury. *Perkins v. Standard Oil Co.*, 395 U.S. at 648. A plaintiff need not prove that the violation of the statute was the sole cause of its injury. "It is enough that the illegality is shown to be a material cause." *Zenith Radio Corp. v. Hazeltine Research [Inc.]*, 395 U.S. 100, 114 n.9 (1969). The court's instructions taken as a whole correctly reflected these legal principles. JA 383, 397, 399-401. *See* Section II.B.2 *supra*.

C. The Jury Properly Considered Evidence of What Plaintiffs' Situation Would Have Been Absent the Violation.

Texaco argues the lower courts misapplied *J. Truett Payne* because the jury was allowed to consider, for purposes of awarding damages, that Texaco may have remedied the price discrimination by lowering its price to the plaintiffs. The district court and court of appeals correctly rejected this argument. PA-15-17, PB-14.

1. Texaco argues that the plaintiffs had to prove damages based solely on the artificial assumption that Texaco would have eliminated the price discrimination only by raising its price to Dompier and Gull. This is totally inconsistent with *J. Truett Payne's* reaffirmation that the jury is to estimate "what plaintiff's situation would have been in the absence of defendant's antitrust violation." 451 U.S. at 566. The Government disagreed with Texaco, U.S. Cert. Br. 8, and recognized that the question of what would have occurred in the market absent discrimination is inherently factual.[44] Moreover, the plaintiffs' damages were not based only on an assumption that Texaco would have lowered their price.

[44] Unlike both *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987) and *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985), cited by Texaco, here plaintiffs' damages did not rest on only one presumed theory that plaintiffs would have received Dompier's price.

Through their economist and other evidence, the plaintiffs provided the jury with six alternative economic projections of what would have occurred in a violation-free market. One of the alternatives was based on an elimination of the discrimination by a reduction in the plaintiffs' price. This was appropriate since Texaco's own business records showed this was one of the options it considered to correct the discrimination.[45] However, the plaintiffs' damages calculations also permitted the jury to award damages based on the removal of the discrimination by increasing the distributor price, or by a combination of a reduction in the plaintiffs' price and an increase in the distributor price, which were alternatives Texaco also considered.

The six different market analyses were comparable to that accepted by the Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 257-59, *reh'g denied*, 327 U.S. 817 (1946), where the plaintiffs estimated damages by comparing their profits to those of a competitor who was not subject to the violation. The damages calculation based on the alternative of lowering the plaintiffs' price did not represent an "unlawful overcharge." It represented damages based on Texaco's own analysis of its options.

2. Texaco also argues that the plaintiffs' damage measures improperly assumed they should have received Dompier's entire discount, rather than the price paid by Dompier's customers. This is simply incorrect. The plaintiffs' damage calculations did not presuppose that the plaintiffs would receive the same price as Dompier when Dompier was selling gasoline to competing retail stations. In that circumstance the damage analysis was based only on the difference between the plaintiffs' price and the price paid by the stations Dompier supplied. R. 1797, 2154, 1805-06, 1891, 1907, 1911, 1914-15, 1928-30, 1937-39, 1942, 1946, 2006, 2131.

[45] *See* JA 477-482, Ex. 1 (unexcised version contained in App. A to Respondents' Brief Oppos. Cert.). Texaco discussed reducing its price to retailers such as plaintiffs with the Federal Energy Administration. Ex. 1, p. 4. This portion of the unexcised exhibit was properly considered by Dr. Leffler in arriving at his expert opinion concerning how Texaco most likely would have eliminated the discrimination. *See* Fed. R. Evid. 703.

3. Texaco's argument that Exhibit 912 was an improper "automatic damages" exhibit is equally without merit. Exhibit 912, which aggregated the total dollars paid by plaintiffs in excess of the prices paid by Dompier or its customers, was not offered as a calculation of damages. R. 1722-1728. The trial court specifically instructed the jury, both when the exhibit was admitted, R. 1723, and at the conclusion of the case, JA 403-404, that the plaintiffs could not prove damages merely by showing the amount of the discrimination.

4. Any argument that the courts below misapplied *J. Truett Payne* should also be rejected because Texaco failed to object to the district court's damage instructions, R. 3134-36, did not object to the testimony of the plaintiffs' economic expert or to the plaintiffs' damage exhibits, and presented no alternative measure of damages. Texaco merely objected to the damage exhibits for "lack of foundation." R. 1754-56, 1761, 1763, 1773. Texaco thus waived its assertions of error. Fed. R. Evid. 103(a).[46]

CONCLUSION

Texaco preserved no factual issue for review by this Court. It raises no objection to the giving or failure to give any jury instructions. Its plea to this Court is for immunity from the consequences of its knowing and deliberate price discrimination even though the Congress authorized no such immunity from the reach of its statute. The Court should defer to the Congress by applying the plain language of its statute, and affirm this judgment. The plaintiffs have proven a strong case of liability and damages in reliance on the plain language of the statute and this Court's clear precedent in *Perkins*. They had to try the case twice because this Court in *J. Truett Payne* rejected the Ninth Circuit's damage rule after the first trial and before the first appeal was final. This Court

[46] Moreover, since Texaco failed to provide an alternative damage theory, it is precluded from arguing that any other theory of damages might have been more reasonable. *Handguards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir. 1984), *cert. denied*, 396 U.S. 1012 (1985).

should not ignore the public's reliance on its precedent where the attack on the precedent is based on differences of opinions about economics, and not on contrary legal precedent. Fourteen years of litigation in reliance on sound precedent does not deserve a further change in the law. Let the verdict stand.

Respectfully submitted, this 6th day of September, 1989.

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APPENDIX A

JURY INSTRUCTION NO.____

In order to recover on a claim of unlawful price discrimination under the Robinson-Patman Act, each plaintiff must establish each of the following elements by a preponderance of all the evidence:

(a) that Texaco sold gasoline to a plaintiff and to Dompier and Gull at or about the same time and under identical market conditions;

(b) that in all instances the gasoline purchased was of like grade and quality;

(c) that Texaco charged the plaintiff a higher price than it charged Dompier or Gull;

(d) that Dompier and Gull passed along the lower price to their customers;

(e) that those customers, who are service stations, reflected that lower price they may have received in their price to motorists;

(f) that the difference in prices resulted in an actual lessening or destruction of substantial competition between the plaintiffs and service stations who were customers of Dompier and Gull;

(g) that the price differences caused plaintiff to lose profits that otherwise he would have enjoyed; and

(h) that as a result of price differences and their effect on competition, each plaintiff's damages may be determined with reasonable certainty and without guesswork.

Each plaintiff must prove every one of these claims by a preponderance of the evidence, or you must find for Texaco.

In addition, Texaco has offered two defenses to plaintiff's claims under Section 2(a) of the Robinson-Patman Act. If Texaco proves either of these defenses, then each plaintiff cannot recover on its claims under Section 2(a) of the Robinson-Patman Act.

For the first defense, Texaco must show that the higher prices to plaintiffs were justified by higher costs involved in serving those customers.

For the second and entirely separate defense, Texaco must show that any lower prices to Dompier Oil Company or Gull Oil Company were offered in good faith to meet specific competition or else Texaco would have lost the sale.

15 U.S.C. 13; *J. Truett Payne v. Chrysler Motor Corp.* (1981) 451 U.S. 557; *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648–9; *Roorda v. American Oil* (W.D.N.Y. 1981) 1981-1 CCH Trade Cas. ¶ 64, 153; *Bel-Aire Markets v. Foremost Dairies, Inc.* (N.D. Cal. 1972) 55 F.R.D. 538.

[District Court Clerk's record entry No. 671 filed May 29, 1985]

(23)

No. 87-2048

IN THE
Supreme Court of the United States
October Term, 1989

TEXACO INC.,

Petitioner,

-vs.-

RICKY HASBROUCK, d/b/a
RICK'S TEXACO, et al.,

Respondents.

RESPONDENTS' RESPONSE TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Nine trade organizations and one corporation have moved for leave to file briefs as amici curiae in support of petitioner.[1] Respondents submit this objection to the motions filed herein.

An application for amicus curiae status must establish that it will set forth relevant facts or questions of law which have not been or will not be adequately presented by the parties, and which have some relevancy to the disposition of the case. Rule 36.3, S. Ct. R. Here, all of the Applicants except one are trade organizations which have overlapping

[1]Motions and briefs were filed by the Society of Independent Gasoline Marketers of America, the National Association of Convenience Stores, the American Petroleum Institute, the National Association of Manufacturers, the National Association of Texaco Wholesalers, the National Association of Wholesaler-Distributors, the Motor Vehicle Manufacturers Association of the United States, the Motor and Equipment Manufacturers Association, the Petroleum Marketers Association of American and Boise Cascade Corporation. The moving parties are referred to herein as "Applicants."

memberships and interests, and positions identical to those of petitioner Texaco, Inc.

1. The Applicants do not represent separate interests. For example, the Motor Vehicle Manufacturers Association's members include Chrysler, Ford, GM, Honda, Volvo and Navistar, but such companies are also members of the National Association of Manufacturers and the Motor and Equipment Manufacturers Association. The Petroleum Marketers Association of America (PMAA) is composed of state and regional trade associations representing jobbers and wholesale distributors of refined petroleum products, including the various Texaco Wholesalers who have filed a separate motion and brief. The Society of Independent Gasoline Marketer Associations (SIGMA) is composed of petroleum wholesalers and retailers who are members of PMAA. Within PMAA, the "Brand Chairman's Committee" is composed of wholesaler representatives of the major petroleum refiners, including Texaco,

who are also members of the National Association of Texaco Wholesalers and the PMAA. The PMAA, in turn, is a member of the National Association of Wholesaler-Distributors, and Boise Cascade Corporation, an individual Applicant, is a member of the National Association of Manufacturers. Because of this substantial duplication of memberships, the Applicants should be limited to one brief, if any filing is appropriate.

2. The Court should deny the Applicants' motion because the proposed amicus briefs all repeat essentially the same argument as made by Texaco. They do not state unique facts or questions of law which are relevant to this case and different from those presented by Texaco. Indeed, the Applicants' motions and proposed briefs affirmatively demonstrate that the Applicants are not aware of the factual record underlying this case, or even the actual question of law presented by Texaco in the courts below. As a result, the

Applicants' views can add little of value to the Court's consideration of Texaco's position.

a. The proposed briefs focus on the issue of a "uniform wholesale discount" which was not presented to the district court or the court of appeals. The evidence, in fact, was that Texaco sold gasoline to "wholesalers" in Spokane at different -- not uniform -- prices, and there was no evidence of uniform prices. See Brief of Respondents. The "safe harbor" of uniform pricing sought by the Applicants cannot be found in the facts of this case.

b. Similarly, each of the Applicants asserts that the Ninth Circuit opinion is a challenge to "legitimate" distributor discounts that are lawful under the Robinson-Patman Act. But this case did not involve legitimate functional discounts at all. See Brief of Respondents. The Applicants' characterization of Dompier and Gull as "legitimate

wholesalers" is contrary to the evidence in the case unless one assumes that the courts will be bound by the label a seller places upon a purchaser. The trial court record established that the question of whether Dompier and Gull were, in fact, retailers, was hotly disputed. That dispute was resolved by the jury in favor of the respondents. See Respondents' Brief.

c. Virtually every Applicant is also unaware that Gull Oil Co., one of Texaco's favored customers, was retailing throughout the entire damage period, and that the other favored customer, Dompier Oil Co., retailed throughout the damages period as well.

3. Each of the Applicants also sets forth issues which are not raised in this record. API and NAM argue that suppliers would somehow violate the Petroleum Marketing Practices Act § 2801 by compliance with the Ninth Circuit opinion. But Texaco never

raised a defense in the district court or court of appeals based upon the PMAA. The Texaco Wholesalers/Distributors argue that retail outlets "exhaust their supply in underground tanks in a quick time frame and wholesalers are better able to resupply retail outlets." Again, such facts were not before the district court or the court of appeals. In any event, this argument assumes that wholesalers have adequate bulk storage to supply local needs which was not the case in Hasbrouck. JA 122-126, 187, 189-192. The Texaco Wholesalers also argue that for some reason, the "national defense" is linked to the facts in this case. Again, no facts pertaining to the petroleum supply as it relates to the national defense were presented in this case in the courts below.

The Motor and Equipment Manufacturers Association argue that wholesalers carry products from a multitude of suppliers, making Robinson-Patman compliance under this

decision impossible. However, in Hasbrouck the plaintiffs and favored purchasers had only one supplier, Texaco. Any decision relating to customers who purchase from more than one supplier will need to await another day.

4. Virtually all the Applicants assume that the Ninth Circuit opinion would require suppliers and their customers to share detailed cost information in order to comply with its decision. The Applicants list a litany of horrors which they assert will result from the Ninth Circuit opinion. These were never presented to either the Ninth Circuit or district court by Texaco. As an example, every Applicant argues that this decision will cause distributional inefficiency, lead to greater vertical integration, resale price maintenance, eliminate wholesalers as a class, result in discrimination among wholesalers, require manufacturers to control the wholesaler's retail price, and harm independent

retail stations. *See*, *e.g.*, Motion and Proposed Brief of SIGMA. None of the above defenses were ever presented in the courts below.

Because the Applicants present no unique facts or questions of law; because they base their arguments on facts outside the record of this case; and because Applicants are not truly separate organizations with separate interests, their motions should be denied. In the alternative, the Court should limit the Applicants to one brief since their interests (and in many respect their memberships) are essentially identical.

RESPECTFULLY SUBMITTED this 6th day of September, 1989.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

—*vs.*—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER TEXACO INC.

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October 6, 1989

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

A. The Basis Upon Which The Decision Below Rested Is Not Defensible

1. Neither Respondents nor their *amici* attempt to defend the rule of law adopted below. Indeed, there is scant mention of the opinions and basis for decision of the Court of Appeals and District Court.[1] It is this Court's practice to "decide the case as it was framed by the Court of Appeals." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. ____, ____ n.2, 108 S. Ct. 1931, 1936 n.2 (1988). Respondents and their *amici* cannot and do not claim it to be sensible, or even possible, for suppliers to calibrate their prices to each wholesaler's costs of operation so as to preclude every wholesaler from having the capability of reducing its resale prices to a retail customer that

1 As is clear from the opinion of the Court of Appeals (PA), as well as that of the District Court (PB), Texaco preserved the issues raised by the Petition and the courts below were abundantly aware of Texaco's position on those issues.

might compete with a retailer buying directly from the supplier. For the reasons discussed in Petitioner's Brief ("P. Br."), the Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner ("U.S. & FTC Br."), and the briefs of the other *amici* supporting Petitioner, there can be no such rule.[2]

2. If there is to be wholesaling, wholesalers *must* pay less than retailers, the difference *must* cover more than wholesaler costs (or no one will become or remain a wholesaler), and absent an illegal resale price maintenance agreement, wholesalers always have the capacity to pass along some or all of their lower price to one or more of their customers whenever they see fit to do so. The assumption below that suppliers could prevent this by tailoring each wholesaler's price to that wholesaler's costs, respectfully, was indisputably erroneous.

B. The Lower Courts Recognized That The Judgment Could Not Be Sustained Unless It Was Unlawful To Sell To A Wholesaler For Less Than Retailers. Respondents' Attempt To Suggest That It Was Unnecessary To Address The Issue is Disingenuous

1. Unable to defend the decision below on its own rationale, Respondents regrettably devote much of their brief to obfuscation of the facts in order to support their suggestion that it might have been unnecessary for the courts below to reach the wholesaling issue given Dompier and Gull's retail operations. Ultimately, however, Respondents are constrained to concede that the damages sought and recovered for the pre-July 1974 period were based upon Dompier's purchases and sales as a *wholesaler* and not any purported retailing.[3] Plaintiffs chose

2 Indeed, a supplier that attempted to implement it could be sued by the FTC and wholesalers. P. Br. 24 n.41; U.S. & FTC Br. 18-19.

3 Brief of Respondents ("R. Br.") 19 ("The damage calculations for pre-1974 were based on the discount Dompier gave its customers. . . ."); 48 ("when Dompier was selling gasoline to competing retail stations. . . . the damage analysis was based only on the difference between the plaintiffs' price and the price paid by the stations Dompier supplied.")

not to present evidence that would permit anyone to separately determine damages for the pre- and post-1974 periods. JA 315, 353-54.[4] Thus, as the courts below recognized, if it was lawful for Texaco to sell to wholesaler Dompier at the wholesaler price when Dompier was merely reselling as a wholesaler to independent retailers, the judgment could not be sustained.[5] The issue could not be disregarded. The courts below concluded that Texaco illegally discriminated in price by selling to a Texaco-brand wholesaler at the same wholesaler discount given all other Texaco-brand wholesalers in Washington and Oregon,[6] because the wholesaler, at times, independently (JA 369) chose to pass along some of the wholesaler discount to some of its independent retailers who, in turn, independently decided to pass along some portion to consumers.[7] Plainly the issue exists.

4 *See also* Transcript of Hearing on Judgment NOV Motion, Docket No. 758, at 36-37 (August 14, 1985).

5 The District Court repeatedly cautioned plaintiffs on this score. *See* P. Br. 12 n.16.

6 Respondents' Brief refers to an exhibit not introduced into evidence to suggest that different Texaco-brand distributors paid different prices in the Spokane District in 1974. R. Br. 13. The document discloses that while prices varied with the retail tankwagon price, the wholesaler discount of 3.65 cents from the retail tankwagon price prevailing in each area was identical for all Texaco-brand distributors in Washington and Oregon. Plaintiffs previously elicited this fact by deposition, and it was read into the record. R. 2346-47. In addition, plaintiffs introduced evidence showing the basically nationwide nature of Texaco's wholesaler discount at the time. R. Br. 10-11 (quoting from JA 410-13); *see also* JA 419-20. Far from the present attempt to imply something unique about Dompier's wholesaler discount, Respondents' counsel complained in summation that the problem was Texaco's desire to give its wholesalers uniform treatment: "Really what happened is Texaco set its price based upon a pricing system and it didn't consider the individual competitive situations in the market." R. 3227.

7 Nothing about Texaco's uniform wholesaler price compelled Dompier to one day raise its prices to some customers and cut prices to others, and to do something different another day. Throughout, Dompier "sold gasoline to different dealers at different prices on or about the same day." R. 946. For long stretches of time, Dompier's prices to its

2. Whether Texaco should be liable for price discrimination damages for charging wholesaler Dompier the wholesaler price when Dompier was functioning as a wholesaler—the crux of this appeal—has nothing to do with Gull and Red Carpet. Plaintiffs attempted to weave these entities in and out of their case below to generate prejudice and confusion with the jury, the lower courts and temporarily, even the Solicitor General's office.[8] It is regrettable that they have seen fit to continue this approach before this Court.

a. Red Carpet Service, Inc.

Red Carpet Service, Inc., a corporation owned by the then owner of Dompier, had two car wash-service station facilities which purchased gasoline from Dompier. JA 119-20, JA 180-81; R. 1863. Plaintiffs explicitly disclaimed seeking compensable damages as to the Red Carpet stations. R. 1863-66.[9] Texaco's motion to strike the testimony as to Red Carpet was denied, with the District Court explaining that because "it is not included in the plaintiffs' damage claim" he thought it might be as "useful" to defendant. R. 1882. In all events, since damages were not being claimed as to Red Carpet, Red Carpet's status as a separate corporation was not further litigated. The issue of the relationship between the Dompier and Red Carpet corporations was not presented to the jury at plaintiffs' specific request. R. 3133. It is more than inappropriate for Respondents to attempt to now interject Red Carpet into this case.

Apart from the Red Carpet corporation car washes, Respondents have no basis whatever for their assertions that "Dompier

retailers were the same or higher than Texaco's prices. P. Br. 9. To require suppliers to set prices to wholesalers and retailers based on the supplier's knowledge of what a single wholesaler is passing on to some retailer and what the latter is passing on to the public at the time, would be to prescribe pointless chaos.

8 *See* Petitioner's Response to Brief for the United States As *Amicus Curiae* 6-8.

9 These facilities charged gasoline prices higher than those charged at the average major-brand full-service station. R. 1143-44.

sold at retail throughout the damages period." R. Br. 23. Plaintiffs themselves advised the jury that Dompier did not acquire its first retailer until 30 months into the damage period and acquired a few others only over several years. JA 357-58. Plaintiffs also necessarily drew no distinction between independent retailers and employee-operated stations in addressing other elements of Robinson-Patman liability, such as competition between favored and non-favored customers and competitive impact. B-6 n.6.

Thus, with respect to competitive impact, although it was an admitted fact that Dompier's prices were set solely by Dompier (JA 369), plaintiffs' counsel advised the jury:

> "This case could have been brought if Mr. Dompier had never salary operated a station, but it only supplied stations the whole time if he was passing the discount to them. . . . If the favored price is passed through the purchaser like Mr. Dompier to his customer, that's price discrimination." JA 361-62.

The District Court also instructed the jury that the basis of plaintiffs' claim is that lower prices to Dompier "were passed through to Dompier Oil Company's customers." Jury Instruction No. 16, JA 388. It repeatedly expressed its concern regarding the fact that Dompier had "no salary operated stations prior to '74" (JA 315),[10] and that plaintiffs had chosen not to differentiate between the period when Dompier was only a wholesaler and when it was both a wholesaler and a retailer, observing, "they are not broken out, I might say." JA 315.

b. Gull Oil Company

Gull Oil Company ("Gull"), as explained in Petitioner's Brief 5-6 and n.5, never marketed Texaco-brand gasoline either as a wholesaler or a retailer. Plaintiffs' damage theory, as exemplified by the very first paragraph of Respondents' Brief,

10 *See also* Transcript of Hearing on Judgment NOV Motion, Docket No. 758, at 38-39 (August 14, 1985): "I have some difficulty with where the discrimination was pre-'74 prior to the time Dompier got in the retail business, and I take it that you strictly rely upon *Perkins*."

was the impact upon them of lower-priced *Texaco brand* stations on their *Texaco brand* stations. Hasbrouck, for example, testified he never noticed his customers at Gull stations. JA 256. Nor, as Respondents' Brief acknowledges, did plaintiffs complain to Texaco about the prices at Gull stations. R. Br. 17 n.14. No Gull station was claimed to have caused compensable damages to any plaintiff. In acknowledging that the "damage calculations for [the] pre-1974 [period] were based on the discount Dompier gave its customers" (R. Br. 19), Respondents confirm the irrelevance of Gull to the issue of liability for those damages.

3. Finally, Respondents' contention that Petitioner, by supposedly not seeking a jury instruction with respect thereto, waived its position that it is not liable for selling to wholesalers at lower prices than retailers (R. Br. 29-30), is frivolous. The District Court took pains to make it emphatically clear that instructions had been sought and rejected and that the issue was fully preserved. R. 3156-58. And, of course, if there were no wholesaler issue in the case, there would be no point to Instructions 18 and 23(A). JA 392-93, 399.

C. Certainly For The Period Damages Were Based Upon Dompier's Purchases And Sales As A Wholesaler, There Was Nothing "Nominal" Or "Illegitimate" About Its Functioning As A Wholesaler: It Had No Other Business

Prior to July 1974, Dompier operated only as a wholesaler, performing the wholesaler's role of selling to retailers. No basis exists for pretending otherwise. Indeed, as described in Petitioner's Brief 7-8, throughout the period of suit and until becoming a Conoco wholesaler, Dompier's functions included: persuading accounts to purchase gasoline and other products from it; handling billing; extending credit; carrying accounts receivable; maintaining trucks, a warehouse and bulk storage facilities; evaluating the purchase and lease of properties for service stations; employing sales and office personnel and facilities; and providing sales promotions and related services to its customers. R. 929-35, 942-44. As plaintiffs conceded, Dompier's pricing decisions were entirely its own. JA 369; R. 895, 946.

D. In All Events, The Jury Was Instructed It Could Find Price Discrimination Notwithstanding Dompier's Being A Wholesaler

Petitioner agrees (P. Br. 22 n.38) that merely labeling an entity a "wholesaler" does not make it one. The issue here, however, is not one of labeling. Liability was imposed notwithstanding acceptance of the fact that Dompier was a wholesaler. Thus, the jury was instructed that even if it concluded Dompier was nothing but a wholesaler, it should still treat it as a competitor of plaintiff retailers if Dompier had retail "customers" that so competed. Jury Instruction No. 23(A), JA 399. The jury was also instructed that "[w]here a seller such as Texaco extends a lower price to a buyer who resells at wholesale, there may be a price discrimination" if the seller knows the wholesaler is going to pass on some portion of its lower price to service station customers. Jury Instruction No. 18, JA 392-93. Although Instruction 18 called for the jury to find "that the disfavored buyer was harmed competitively by reason of the fact that a portion of the difference was passed on" (*id.*), the jury was not asked to find that Texaco had any reason to believe such might be the consequence.

E. The Significance Of Supplier Awareness That A Wholesaler Will Price Below The Supplier's Retailer Price

1. Whether because of the overriding breadth of Jury Instruction No. 23(A) or otherwise, the Court of Appeals did not adopt the supplier awareness element of Jury Instruction No. 18 as its basis for decision.[11] Respondents, however, recog-

11 The District Court advised the jury that Instruction No. 18 was directed to the determination of the necessary effect on competition. JA 392. Under Instruction No. 23(A) and the *Morton Salt* Instruction No. 20 (JA 394-96), the jury was permitted to simply "infer" such an effect and by-pass Instruction No. 18. The Court of Appeals chose to emphasize the applicability of the *Morton Salt* inference and disregard Instruction No. 18 (PA 11), as of course the jury also might have done.

nizing the blatant unfairness of holding suppliers liable for the consequences of independent pricing decisions of independent wholesalers they are prohibited from controlling, urge the awareness element of Instruction No. 18 as the solution. R. Br. 39-40.

2. Assuming the jury, unlike the Court of Appeals, chose to weigh the awareness element of Instruction No. 18,[12] awareness still solves nothing. The issue remains: What is a supplier supposed to do when it learns a wholesaler's price to some retailers is lower than its own retailer price? The source is likely to be a complaint from a direct-buying retailer about the low prices at a retailer buying from the wholesaler. The choices would appear to be these: (a) terminate the wholesaler (assuming it can be done lawfully, *see* Petroleum Marketing Practices Act, 15 U.S.C. § 2802 (1982)); (b) somehow cause the wholesaler to terminate its price-cutting retailer; (c) somehow get the wholesaler or its price-cutting retailer to agree to refrain from pricing low in the future; (d) discipline the wholesaler by singling it out for a price increase; (e) somehow get the wholesaler to discipline its price-cutting retailer by increasing its price to that retailer; (f) assuming it would not violate below-cost, primary-line discrimination and Sherman Act strictures, refrain from independently determining what prices to charge its direct-supplied retailers and adopt those of the wholesaler (assuming the unlikely prospect of feasibility);[13] and (g) promptly terminate the complaining retailer to protect against a future successful Robin-

12 Instruction No. 18 does not require that the supplier have any idea about the size, duration or consequences of the wholesaler's pass-on. JA 392-93.

13 Feasibility would entail, *inter alia*, immediate accurate information about the wholesaler's pricing decisions. There is no good reason why a wholesaler would make such information available. If it did, and like Dompier regularly charged different prices to different customers, the legal and practical problems of matching would be enormous. If more than one wholesaler were involved, the problems would be impossible. As the District court observed:

> "Dompier changes its prices daily and does Texaco run around and find out what Dompier is charging and sets its price by what Dompier is charging?" R. 2135.

son-Patman suit that would result from the failure to effectively do (a)-(f), should Instruction No. 18 be good law.

3. The alternatives that are the least onerous economically entail one or another form of illegal price-fixing. There is no escaping the incentive to such anticompetitive behavior that would be engendered by the imposition of new Robinson-Patman liability based on attributing to suppliers the consequences of the independent pricing decisions of their independent wholesalers if the supplier is aware of passing-on by the wholesaler.

F. Federal Courts Must Not Become Arenas For Assessing What Should Have Been The "Appropriate" Price Differential Between A Supplier's Wholesalers And Retailers

1. The Order affirmed in pertinent part by this Court in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), prohibited different prices among wholesalers and among retailers, but allowed different pricing between the two levels of trade so long as retailers were not charged less than wholesalers. (P. Br. 17 n.24). Implicit in the form of the Order was a recognition of the impracticability and inadvisability of attempting to set, before or after the fact, what should be the "appropriate" differential between them. Since *Morton Salt* and before, the determination has been left to the day-to-day judgment and negotiations of the businesses involved and the marketplace.

2. In seeking to impose Robinson-Patman liability upon a supplier that complied with the *Morton Salt* Order—not discriminating among its wholesalers or among its retailers and not charging retailers less than wholesalers—Respondents would have federal juries and courts, under the guise of the Robinson-Patman Act, assess the "spread" and on some unknowable, after-the-fact basis, pronounce it lawful or unlawful and, if the latter, impose potentially massive liabilities.

During the time in question, the wholesaler-retailer differential moved from 3.95 cents to 2.65 cents. Assuming Respondents are correct that a very wise, informed and effective businessman might have been able to assess the changing envi-

ronment sooner, have formulated new plans more promptly and have implemented them with greater expedition, these are not, and must not be made, the tests of legality under the Robinson-Patman Act.

G. Existence Of A Wholesaler-Retailer Differential, As Recognized By The *Morton Salt* Order, Is A Necessary Fact Of Commercial Life That Was Not Outlawed By The Robinson-Patman Act

1. Neither Respondents nor their *amici* dispute that it is essential to wholesaling that the wholesaler pay less than retailers. Nor do they dispute that at the time of the Robinson-Patman Act, the practice of selling to wholesalers at lower prices than retailers was wide-spread, age-old, lawful and not the subject of complaint to Congress. It is also indisputable that Congress was aware of the practice, had no ill-will towards wholesalers and no intention to disrupt on-going supplier-wholesaler relationships.

2. In this context, the notion that by dropping the proposed *addition* of a superfluous functional classification provision that reflected existing law but was opposed by some agricultural interests (not because they had anything against wholesalers having a differential but because they feared the language might adversely impact them), Congress somehow intended *sub silentio* to turn existing practice and law on its head, respectfully, is absurd. U.S. & FTC Br. 22-25. The fact that there was "absolutely no opposition to striking this paragraph from the bill"[14] underscores the absence of an intention to change anything.

3. Given the *Morton Salt* Order, the half-century of continued, unchallenged wholesaler-retailer price differentials, the "safe harbor" representations of the federal enforcement agencies (*see* P. Br. 18 and n.27) and their repudiation of the *Standard Oil*[15] approach (*see* U.S. & FTC Br. 20-22 and 1a-2a),

14 80 Cong. Rec. 8122-23 (May 27, 1936) (Statement of Rep. Boileau), *reprinted in* 4 E. Kintner, *Federal Antitrust Laws and Related Statutes* 3287 (1980).

15 *Standard Oil* v. *FTC*, 340 U.S. 460 (1962).

and the otherwise unanimous position of the federal courts (*see* U.S. & FTC Br. 14 n.9; P. Br. 19 n.28), to now overturn settled commercial practice something more is required than reliance upon what Congress did *not add* in 1936.

4. Nor are the Respondents aided by anything done or not done by Congress since 1936. The legislative materials cited by Respondents (R. Br. 31 n. 28) reveal that Congress has never questioned the lawfulness of wholesaler discounts in considering subsequently proposed amendments to the Robinson-Patman Act. The 1961 congressional hearings concerned not the legality of wholesaler discounts, but rather the wisdom of three proposed identical amendments to the Robinson-Patman Act that would have *mandated* wholesaler discounts sufficient to ensure that a wholesaler-supplied retailer was given a competitive price with that of a direct-buying retailer.[16] The 1969 and 1975 hearings did not address whether wholesaler discounts were lawful, but were concerned with recommendations for the complete overhaul or repeal of the Act.[17] Former FTC Chairman Kintner (counsel for petitioner in *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969) and a supporter of the Act) represented to the relevant subcommittee of the 94th Congress—

16 *Functional Discounts: Hearings on H.R. 3465, H.R. 4151, and H.R. 4529 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 4-6 (August 30, 1961). The proposed amendments were criticized by the then Chairman of the FTC and the prior Chairman as being unworkable in requiring the seller to determine its wholesaler's costs and profit factors in order to calculate the appropriate differential between the price charged to wholesalers and the price charged to direct-buying retailers. (*Id.* at 10, 14-18, 21).

17 *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcomm. on Small Business and the Robinson-Patman Act of the House Select Comm. on Small Business*, 91st Cong., 1st Sess. (October 7-9, 1969; February 4-6 and 26-27, 1970; March 3-4 and 11, 1970); *Recent Efforts to Amend or Repeal the Robinson-Patman Act—Parts 1 and 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the House Comm. on Small Business*, 94th Cong., 1st Sess. (November 5-6, 11-12 and 19, 1975; December 10-11, 1975; January 26-27, 1976) ("1975-76 Hearings").

which later rejected all recommendations to repeal or amend the Robinson-Patman Act—that wholesale discounts were *lawful* under the Act.[18]

5. Nor is there anything in the "plain-meaning" of the Robinson-Patman Act (an oxymoron, it would seem)[19] requiring a different result. Section 2(a) speaks of "price discrimination" not "price difference." Outside the primary-line context (geographic price differences injurious to competitors of the *seller*), as this Court observed in *Anheuser-Busch*,[20] Representative Utterback (a manager of the Conference Bill which became § 2(a)), explained:

> "that 'a discrimination is *more than a mere difference*,' and exists *only* when there is 'some relationship . . . between the parties to the discrimination which *entitles them to equal treatment*.' Such a relationship would prevail among competing purchasers . . . ."[21]

Since there *must* be a wholesaler-retailer price differential and there *cannot* be "equal treatment," the differential is not "price discrimination" within the meaning of the Act. The wholesaler-retailer price differential was not viewed as "price discrimination" before the Robinson-Patman amendment, and there is no basis for viewing it as "price discrimination" afterwards. Respondents and their *amici* cannot simultaneously ask for strict construction and ignore this fact.

18 1975-76 Hearings, Part 1, at 227 (November 11, 1975) ("It is important to note that the [A]ct does not prohibit a seller from establishing different prices at different distribution levels, for example, between wholesalers and retailers, in order to compensate buyers who perform distributional functions"). Given this explicit statement from Mr. Kintner, Respondents' attempt to read anything into his passing reference to the *Perkins* case (R. Br. at 37-38 n.36) is unavailing.

19 U.S. & FTC Br. 12 n.6 and text. By contrast, Respondents find the language of the Robinson-Patman Act "simple and straightforward." R. Br. 30.

20 FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960). *See* discussion, P. Br. 21-22.

21 *Anheuser-Busch, supra*, 363 U.S. at 547. (Emphasis added).

6. Where there is only a lower price to a higher level of trade (as opposed to a "discrimination"), the wholesaler's independent pricing decisions are not attributable to the supplier. P. Br. 22 n.38. But where there is a "discrimination" between purchases at the same level of trade ("which entitles them to equal treatment"), the supplier will be liable for the consequences of the favored buyer's pricing decisions *flowing from that discrimination. E.g., Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969); *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983).

7. The States' *amici* brief ("States' Br.") takes a particularly extreme position. To them, wholesaler-retailer differentials, even if never passed on and never causing injury, are still unlawful if the wholesaler merely *might* sell to retailers that compete with direct-buying retailers:

> "Actual passing on of the discriminatory discount is not necessary to have the requisite effect for purposes of liability under Section 2(a). It is enough that the discrimination makes such competitive effect a reasonable possibility." States' Br. 8 n.13.

Thus, to avoid Robinson-Patman Act exposure, the States counsel two choices (States' Br. 11-12):

a. The affirmative defense of cost justification, as to which the uncertain state of the law and of "cost" accounting, projection and analysis, particularly as applicable to the key but amorphous function performed by wholesalers of persuading retailers to buy and remain good customers, would preclude any lawyer from being able to assure the client of success;[22] or

b. Simply getting rid of retailers and/or wholesalers in every market so that only one or the other will remain, thereby assuring that the various markets will be less competitive—i.e., protect retailers from the prospect of potential competition by terminating them entirely. Respectfully, the States evince no

22 *See* United States v. Borden Co., 370 U.S. 460 (1962); ABA Antitrust Section, Monograph No. 4, *The Robinson-Patman Act: Policy and Law Volume II*, 99-120 (1983).

recognition of this Court's repeated admonition that the Robinson-Patman Act be construed consistently with broader policies of the antitrust laws. P. Br. 28 n. 47; U.S. & FTC Br. 18-22. Nor do they recognize that the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.*, was enacted in 1978 and precluded the termination of wholesalers and retailers without cause in this industry, unless the supplier withdraws from the market entirely.

8. As the Brief of the United States and FTC demonstrates (U.S. & FTC Br. 25-28), nothing in this Court's prior decisions would lead to the conclusion that it is unlawful for suppliers to sell to wholesalers for less than retailers. The reliance of Respondents and their *amici* on this Court's opinion in *Perkins, supra*, is misplaced. To characterize Perkins as a retailer complaining of the lower price given to a wholesaler is to misstate the facts of *Perkins*. The briefs before this Court in *Perkins* make clear that the focus in fact was on Perkins' status as a wholesaler:

> "While Petitioner [Perkins] operated principally as a *wholesaler*, he also operated service stations. . . . Perkins *bought all of his gasoline, including the gasoline he sold at retail, at the jobber price* (*wholesale*) of 4 to 5 1/2 cents per gallon below the posted tank-truck price." Brief for Respondent In Opposition at 5, filed November 7, 1968, October Term 1968, No. 624. (Emphasis added).

Consistent with these facts, the Brief for Petitioner stated the Question Presented as follows:

> "Whether Standard's discrimination in price between competing *wholesalers*—which substantially lessened competition in the Pacific Northwest wholesale and retail gasoline markets—is immune from attack under Section 2(a) of the Clayton Act solely because the most direct and immediate competitive injury was felt at the retail level and, in reaching that level, Standard's gasoline was resold by the favored wholesaler to a majority-owned subsidiary which, in turn, resold again to its majority-owned retail outlets." Brief for Petitioner at 3, filed April 7, 1969, October Term 1968, No. 624. (Emphasis added).

Thus, both sides acknowledged that the price discrimination was between entities *at the same level of trade*—wholesale.

H. Inferring Injury To Competition From The Unsurprising Fact That Wholesalers Have Been Charged Less Than Retailers Is Indefensible

Respondents contend (R. Br. 45) this point was waived because there was no objection to Instruction No. 20, the *Morton Salt* inference instruction. JA 394-96. That Instruction correctly states the inference by requiring the purchasers to be "in competition with each other." The problem was created by Instruction No. 23(A), to which Petitioner objected (R. 3158-59), which defined "in competition with each other" so expansively as to include Dompier's customers, thereby destroying the logic of the inference.

I. Damages Were Sought On The Basis Of "Texaco Decreasing Plaintiffs' Purchase Price To Dompier's Purchase Price." Plaintiffs' Exhibits And Representations Did Not Distinguish The Pre- And Post-1974 Periods

Respondents assert we were mistaken in believing the plaintiff-retailers sought and obtained damages based on the claim that they ought to have received the wholesaler price for the pre-1974 period (R. Br. 48). If we were, we do not believe we were alone. Plaintiffs' Exhibits in question, P. Ex. 915 and 916, are captioned:

> "Price Discrimination Eliminated By Texaco Decreasing Plaintiffs' Purchase Price To Dompier's Purchase Price".

Similarly, plaintiffs' counsel advised the jury in summation:

> "916 and 915 go together . . . . They are another scenario, if Texaco dropped the price to the plaintiffs to Dompier's price." R. 3223.

Nor does anything in the opinions of the District Court or Court of Appeals indicate otherwise, and those opinions can be used as establishing the law. Throughout Respondents' briefs, and, indeed, the entire case, they have consistently used the words "the discrimination" to mean the wholesaler-retailer price differential. The theory of their damages was that they were entitled to eliminate "the discrimination" one of three ways: giving themselves Dompier's price; giving Dompier their price or splitting the difference. This is plainly reflected in the decisions below approving this approach.

Respondents might have obviated some of the confusion by separately presenting their pre '74 damages to the jury. They chose not to do so.[23]

J. By Receiving A Damage Award Based On Plaintiffs' Obtaining The "Favored" Price, Plaintiffs Obtained More Than They Are Entitled To By Law

"Automatic damages" were rejected in *J. Truett Payne*[24] because a disfavored purchaser has no legal right to the favored price. A seller has every right to continue selling the "disfavored" purchaser at its high price so long as it stops selling at the low price to the "favored" purchaser.

Respondents assume they can get more than they are legally entitled to if they offer 3 or 6 scenarios and combine the permissible with the impermissible.[25] Respectfully, that cannot be the law.

---

23 *See* Transcript of Hearing on Judgment NOV Motion, Docket No. 758, at 36-37 (August 14, 1985).

24 *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981).

25 Thus Respondents assert:

"Unlike both *Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987) and *Olympia Co., Inc.* v. *Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985), cited by Texaco, here plaintiffs' damages did not rest on only one presumed theory that plaintiffs would have received Dompier's price." R. Br. 47 n.44.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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October 6, 1989

No. 87-2048

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

TEXACO, INC.
Petitioner

v.

RICKY HASBROUCK, d/b/a RICK'S TEXACO, ET AL.
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THIRTY-FIVE STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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SEPTEMBER 6, 1989

Printed by

Brescia's Printing Services, Inc.
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INTRODUCTION

The States of Alabama, Alaska, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington and Wyoming (hereinafter the "Amici States") submit this brief in support of the respondents, retail gasoline dealers. The decision of the Ninth Circuit in *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988), should be affirmed.

INTEREST OF AMICI STATES

The Amici States have a clear and strong interest in an interpretation of the antitrust laws, including the Robinson-Patman Act, consistent with sound policy and Congressional intent. The respective Attorneys General of many of these Amici States are charged with the responsibility of enforcing state antitrust provisions similar or identical to the Robinson-Patman Act.[1] Other states enforce price discrimination prohibitions under state unfair trade practice laws[2] or other related statutes.[3] These various state laws are often construed in accordance with this Court's interpretation of their federal counterparts.[4] Therefore, this Court's determination in this case will directly affect the Amici States' enforcement of state laws pertaining to price discrimination, and will have an impact far beyond the question of federal law presented herein.

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[1] *E.g.*, Conn. Gen. Stat. § 35-45; Md. Comm. Law Code Ann. § 11-204(a)(3)-(5) (1983).

[2] *E.g.*, Me. Rev. Stat. Ann. tit. 5, §§ 206-213.

[3] *E.g.*, N.C. Gen. Stat. § 75-5(b)(4) and (5).

[4] *See, e.g.*, *Connecticut v. Exxon Corp.*, 1987-1 Trade Cas. (CCH) ¶ 67,579 (Conn. Super. Ct. 1987); *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Moreover, the Attorneys General represent their states as common law *parens patriae* in federal antitrust actions, including price discrimination cases.[5] The states play a major role in antitrust enforcement, and have a substantial interest in assuring that such trade regulation laws are interpreted in accord with antitrust policy and this Court's prior decisions.

The Amici States support the rationale of the Ninth Circuit that price discrimination in favor of nominal wholesalers vis-a-vis retailers operating within the same market is actionable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), where such price discrimination has the reasonable possibility of adversely affecting competition between such retailers and retailer-customers of such wholesalers.

SUMMARY OF ARGUMENT

1. Predicating a Section 2(a) Robinson-Patman Act violation upon lower price sales to wholesalers vis-a-vis retailers operating in distribution chains within the same market is fully consistent with the express statutory language of the Act. The touchstone of a Section 2(a) violation is not the functional level of the purchasers, but whether the discrimination has a "reasonable possibility" of affecting competition. The precise theory of the tertiary-line portion of respondents' case has been accepted by this Court in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), and has long-standing support in the case law, commentary and legislative history of the Act.

2. Focusing analysis upon the effect of the discrimination rather than the nominal functional level of the purchasers is consistent with overall antitrust policy. It will not disrupt traditional distribution patterns. Rather, analysis of competitive effects would assure that prices charged by a dual-distributing supplier promote, rather than retard, competition and efficient distribution.

3. As conceived in *FTC v. Morton Salt, Inc.*, 334 U.S. 37 (1948), the "self-evident" inference of injury to competition resulting from substantial price discrimination over time applies to cases involving discriminatorily lower prices to wholesalers. The *Morton Salt* rule establishes the substantiality of a price discrimination and creates a rebuttable presumption that competition may be affected. Such a presumption is important to effective antitrust enforcement and consistent with the specific burden of proof scheme of the Robinson-Patman Act. If a substantial "wholesaler" discount is a true functional discount, then the presumption can be rebutted by such a showing. Abrogation of long accepted rules of presumption and burden of proof will hamper effective enforcement and thwart statutory policy.

[5] *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Burch v. Goodyear Tire & Rubber Co.*, 554 F.2d 633 (4th Cir. 1977).

ARGUMENT

Section 2(a) of the Robinson-Patman Act prohibits price discriminations[6] between two purchasers of commodities of like grade and quality, where the effect of such discrimination "may be substantially to lessen competition . . . or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[7] 15 U.S.C. § 13(a).

I. DISCRIMINATION BETWEEN A WHOLESALER AND A RETAILER MAY SUPPORT A PRICE DISCRIMINATION CLAIM WHERE SUCH DISCRIMINATION MAY ADVERSELY AFFECT COMPETITION AMONG RETAILERS.

The principal question presented here is whether lower prices to wholesalers than to retailers operating within distribution chains in the same market can *ever* support a Section 2(a) violation. Texaco contends that the denominated functional level of the recipients of the disparate prices is determinative. However, even a cursory reading of the language of the Robinson-Patman Act and the vast body of its jurisprudence demonstrates that the critical inquiry is *not* the functional level of the purchaser but, rather, whether the price discrimination may affect competition. The Robinson-Patman Act does not require that the direct purchasers be in head-to-head direct competition with one another;[8] it merely requires

[6] A price discrimination is merely a price difference. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 550–51 (1960); *FTC v. Morton Salt, Inc.*, 334 U.S. 37, 45 (1948).

[7] Since Section 2(a) is prophylactic in nature, actual harm to competition is not required to establish a violation; a "reasonable possibility" of such harm is sufficient. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435–36 (1983).

[8] Indeed, the statutory language of Section 2(a) is directly to the contrary. See footnote 14 *infra*.

that competition as described in the Act may be adversely affected by the discrimination.[9]

Sales favoring wholesalers and disfavoring retailers, through unjustified functional discounts or otherwise, may have the requisite anti-competitive effect. As one noted commentator has explained:

> At first glance, it may appear that concerns performing different functions are not in competition with one another and that, therefore, discrimination among them cannot hurt competition. However, damage to competition might result from functional discounts at three competitive levels. First, a seller might use such discounts for a discriminatory attack on his competitors and thereby injure competition in the primary line. Second, two or more functional classes of distributors might be differentiated by characteristics that did not prevent them from competing for the same customers, and discrimination among them might adversely affect that competition. *Third, though the functional classes receiving the discounts might operate at different distributive levels, as do wholesalers and retailers, the customers of one class might be in competition with the members of the other, as retailers who buy from wholesalers are in competition with retailers who buy directly from the manufacturer; and the relative size of the functional discounts might be such as to affect the relative opportunity of those customers.* The statute applies whenever competition is damaged by discrimination in any of these ways, regardless of the purposes that may underlie the discount structure . . . . A discrimination is unlawful if all or part of a disfavored class of customers may be injured.

[9] Once injury to competition is established under the Act, a plaintiff seeking damages pursuant to Section 4 of the Clayton Act must still establish that it suffered antitrust injury. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Once antitrust injury is established, however, precision in fixing the amount of damages is not required. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123–24 (1969).

C. Edwards, *The Price Discrimination Law*, 287 (1959) (emphasis added). *See also* C. Austin, *Price Discrimination*, 51-57 (2d ed. 1959).

The third category of competitive harm described above is termed "third line" or "tertiary line" injury.

> The so-called 'third line' injury concept comes into play only when the supplier *favors* his distributors, whose customers compete with other purchasers from the supplier, whereby competition *with* the *customer* of the purchaser may be impaired.

Guyott Co. v. Texaco, Inc., 261 F. Supp. 942, 950 (D. Conn. 1966) *quoting* F. Rowe, *Price Discrimination Under the Robinson-Patman Act*, 196 n.97 (1962). A portion[10] of the respondents' claim here is that Texaco's discrimination in favor of nominal wholesalers Dompier and Gull had the requisite tertiary line effect.

Courts have long recognized that discriminatory prices charged to retailers vis-a-vis wholesalers may be an illegal discrimination so long as there is the requisite effect on competition, including third-line competitive injury. *E.g., Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds* 340 U.S. 231 (1951); *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942 (D. Conn 1966); *Krug v. International Telephone and Telegraph Corp.*, 142 F. Supp. 230 (D.N.J. 1956); *accord* C. Austin, *Price Discrimination*, 51-57 (2d ed. 1959).[11]

[10]Portions of respondents' claims also center on second line injury occasioned by Dompier's and Gull's activity as retailers. Texaco has focused its appeal entirely upon the tertiary line aspects of this case.

[11]Texaco and its supportive amici take seemingly relevant language from several lower court decisions suggesting that price discrimination between different functional levels is not actionable. *E.g.*, Texaco Br. at 19 n. 28.

(continued)

Moreover, it matters not whether the price discrimination favors the wholesaler or the direct-buying retailer. Thus, price discriminations involving lower prices to direct-buying retailers have been consistently held illegal, despite the disparate purchasers being at different levels of the distribution chain. *See, e.g., FTC v. Morton Salt Co.*, 334 U.S. 37, 41 (1940); *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 924-25 (9th Cir. 1964) *cert. denied*, 379 U.S. 965 (1965) ("It is not necessary that the purchasers involved must be on the same distributive level. A violation . . . may occur when a manufacturer sells . . . to a retailer at a lesser price than that charged to a wholesaler whose customers compete with the retailer"); *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 701-02 (9th Cir. 1964); *Krug v. International Telephone and Telegraph Corp.*, 142 F. Supp. 230, 235 (D.N.J. 1956) ("There can be no doubt that a violation of Section 2(a) may occur when a manufacturer sells his products to a retailer at a lower price than that charged to a wholesaler whose customers compete with the retailer.")

Similarly, courts have not hesitated to find illegal price discrimination where the supplier charged higher prices to direct-buying retailers than to wholesalers. *See, e.g., Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949). In *Standard Oil v. FTC*, the Seventh Circuit affirmed the Federal Trade Commission's finding that Standard Oil violated the Robinson-Patman Act by charging discriminatory prices in a fact

[11] *(continued)*

However, even a casual reading of those cases makes clear that the critical inquiry is whether the price discrimination may affect competition, *not* the functional level of the purchasers. For example, *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976) focused inquiry on the possibility of competitive effect, finding none because the disparate purchasers operated in "separate distinct market[s], open only to a single producer." *Id.* at 1067. The other cases relied upon by Texaco also do not support the broad dispositive proposition for which they are misleadingly cited. See discussion of this point in Br. of United States on Petition for Certiorari at 13 n.15.

pattern similar to that alleged in this case.[12] Standard Oil sold gasoline to direct-buying retailers at prices higher than that charged to "jobbers" who resold to retailers competing with the direct-buying retailers. Despite the jobbers and direct-buying retailers being at different levels of the distribution chain, the Court found ample competitive harm since jobbers could favor their retailer customers who would in turn gain a competitive advantage over direct-buying retailers. As the Seventh Circuit put it, the discriminatory prices that Standard Oil charged to direct-buying retailers vis-a-vis jobbers gave "a club to its wholesalers which they passed on to their retailers to bludgeon their competitors." 173 F.2d at 216.[13]

This Court, following the clear direction of the statutory language and prior case law, also has confirmed the violation of Section 2(a) based upon sales to wholesalers at lower prices than to direct-buying retailers. In *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), Standard Oil sold gasoline to Perkins, a large direct-buying retailer, at prices higher than gasoline sold to Signal, a wholesaler. Signal in turn sold the gasoline to another wholesaler who sold the gasoline to Regal, a retailer in competition with Perkins. Before deciding that even this series of transactions constituted a Robinson-Patman violation, this Court affirmed that discriminatory sales to wholesalers and retailers are illegal when they have the requisite competitive effect at the retailer level. *Perkins* succinctly states:

[12] A significant dissimilarity between *Standard Oil* and the instant case is the strong evidence here that the "wholesalers" often performed virtually no wholesaling functions. For example, Gull had no bulk plant in the Spokane area. J.A. 379.

[13] Actual passing on of the discriminatory discount is not necessary to have the requisite effect for purposes of liability under Section 2(a). It is enough that the discrimination makes such competitive effect a reasonable possibility. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983); *accord, Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 679-80 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Standard Oil Co. v. FTC*, 173 F.2d at 216.

> Signal . . . was able to insist upon a discriminatorily lower price. Had Signal then sold its gas directly to the Regal Stations, giving Regal stations a competitive advantage, there would be no question . . . that a clear violation of the Robinson-Patman Act had been committed.

Id. at 647-48.[14]

The propriety of applying the Robinson-Patman Act to discrimination between purchasers at different levels of distribution chains has its roots in the very genesis of the Act. When the Robinson-Patman Act was originally proposed in both the House and Senate, Section 2(a) contained a proviso that:

> nothing herein contained shall prevent differentials in prices as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture.

H.R. 8442, 74th Cong., 1st Sess., June 11, 1935; S.3154, 74th Cong. 1st Sess., June 26, 1935. Thus, the bill originally

[14] This Court, in other contexts as well, has specifically observed that Section 2(a) of the Act may be violated by discriminatory sales to purchasers at different functional levels.

> [W]hen Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms. It did so in § 2(a) of the Act [15 U.S.C. § 13(a), the Robinson-Patman Act]

FTC v. Fred Meyer, Inc., 390 U.S. 341, 356-57 (1968); *accord, Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437 (1983); *FTC v. Sun Oil Co.*, 371 U.S. 505, 514 (1963) ("in § 2(a) . . . the intent to give broader scope was expressly effected by the prohibition of price discriminations which, *inter alia*, adversely affected competition not only with the seller who grants the favored price, but with the knowing recipient thereof and with customers of either of them").

exempted discrimination between different levels of the distribution chain. However, when Congress passed the Robinson-Patman Act, it deleted this exemption, making clear that the Act's reach was broad, and that the statute was intended to apply even to discriminations between different levels of the same distribution chain. The legislative history of the Act demonstrates a clear movement away from a statutory framework that allowed wholesalers and their retailer customers unwarranted advantages over direct-buying retailers. *See generally*, J. Palamountain, *The Politics of Distribution*, 228–30 (1955).

This Court's consistent recognition, confirmed by statutory language and legislative history, that price discrimination may have the requisite anti-competitive effect at any level of the distribution chain, makes it clear that Robinson-Patman liability may attach even when the favored and disfavored purchasers are not on the same functional level. *Perkins* is sound and controlling.

II. APPLICATION OF PLAINTIFFS' THEORY WILL NOT DISRUPT TRADITIONAL DISTRIBUTION PRACTICES.

In order to escape the clear and compelling precedent establishing the viability of respondents' theory of liability, Texaco offers the Court a parade of horribles. Essentially, Texaco claims that the supplier-wholesaler-retailer chain, a "traditional" method of distribution, will be destroyed.[15] Your amici assert that application of Robinson-Patman requirements will not disrupt such distribution.

[15]Texaco is simply wrong when it further suggests that so-called dual-distribution — whereby a supplier sells to both wholesalers and retailers *in the same market* — is essential to this traditional pattern of distribution. In fact, such dual-distribution is not even the dominant practice in the gasoline industry. *See, e.g.*, F. Allvine and J. Patterson, *The Marketing of Gasoline*, 55–56 (1972).

Texaco has lawful options consistent with traditional distribution patterns which would not create Robinson-Patman exposure. For example, Texaco could cease dual-distribution and, in a given market, distribute solely to wholesalers, who in turn would sell to retailers or it could distribute directly to retailers only. Several of its competitors have chosen this option.[16] Alternatively, *Texaco could continue dual-distribution in a lawful manner.* Functional discounts to different functional levels of the distribution chain are permissible to the extent that the discounts are reasonably related to the cost savings *to the supplier* of having a wholesaler perform certain functions (*e.g.*, stocking, delivery, marketing and sales services). *See, Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). The wholesaler profits only if it provides such functions more efficiently than the supplier, thus assuring that dual distribution adds efficiencies to the market (or at least does not create inefficiencies). To the extent they are cost-justified,[17] functional discounts are lawful.[18]

[16]*See*, F. Allvine and J. Patterson, *supra* note 15 at 55–56.

[17]Such cost-justification is an affirmative defense as to which the defendant carries the burden of proof. *See, Morton Salt Co. v. FTC*, 334 U.S. 37, 48 (1948). The Ninth Circuit found Texaco's proof concerning a cost-justification of its wholesaler discount to be "clearly inadequate." 842 F.2d at 1039.

[18]Texaco's principal complaint is that in order to avoid Robinson-Patman liability it must account for the costs and market conduct of its purchasers. Texaco Br. at 19–28. This is untrue. If Texaco cost-justified its functional discounts, as suggested above, it would be in full command of all information necessary to escape liability — the amount of *its own* costs of providing wholesaling functions.

If Texaco opted not to cost-justify its discounts, then of course Texaco could attempt to avoid liability by demonstrating a lack of possibility of competitive injury by tracing its purchasers costs or selling prices. *See, Doubleday & Co.*, 52 F.T.C. 169 (1955); *but see, Mueller Co.*, 60 F.T.C. 120. But such a burden would be undertaken by Texaco's own choice.

Application of Section 2(a) to a wholesaler discount, therefore, does not upset the traditional hierarchy of distribution.[19] It only requires that Texaco cost justify its dual-distribution practice or return to the traditional practice of single distribution in a given market.

III. APPLICATION OF THE *MORTON SALT* RULE IS APPROPRIATE HERE.

This Court has consistently held that a substantial price differential over time demonstrates *prima facie* evidence of injury to competition under the Act. *FTC v. Morton Salt*, 334 U.S. 37, 47 (1948); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437 (1983); *accord, e.g., National Dairy Products Corp. v. FTC*, 395 F.2d 517, 521 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968).

This rule recognizes that the competitive injury component of a Section 2(a) claim is designed to arrest harmful discrimination in its incipiency, before it achieves its *full* potential for competitive injury. Meeting the *Morton Salt* rule establishes the substantiality of the price discrimination, and thus creates the "self-evident," "reasonable possibility" that the unjustified price discrimination may have a harmful effect on competition.

[19]The Court in *Standard Oil v. FTC* likewise rejected the contention that prohibition of non-cost-justified discriminatory prices to wholesalers vis-a-vis retailers, would place an undue burden on business. The Court noted that in order to conduct lawful business:

> [T]he petitioner may . . . discontinue selling to wholesalers at a price different than that made to retailers. The petitioner's three largest competitors in Detroit have found it agreeable to do so. The petitioner argues that this is an elimination of wholesalers. If this be true, it is elimination only where their existence cannot be justified except on the exploitation of a differential in price not justified by any cost savings to obtain that price. This does not impress us as either illegal, unwarranted or unjust.

173 F.2d at 217.

This presumption of competitive injury by substantial price discrimination is designed to enhance "effective enforcement of the Act." *FTC v. Morton Salt Co.*, 334 U.S. at 50. Such presumptions have long been employed by this Court to allow efficient enforcement of the antitrust laws in areas of long-standing Court experience. *E.g., Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (*per se* rule essential to effective enforcement); *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109–10 (1984) (unjustified restraint on output carries presumption of competitive harm). The presumption is also consistent with the specific statutory scheme of the Robinson-Patman Act. Under Section 2(b) of the Act, 15 U.S.C. § 13(b), the burden is upon the price discriminator to show that the price discrimination did not have the reasonable possibility of injury to competition. *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir. 1945).[20]

For forty years, the *Morton Salt* rule has proven sound in policy and practice. Texaco has advanced no reason to abandon this proven precedent. Texaco's only contention is that there was no competitive harm. However, the Ninth Circuit found that the respondents fortified the *Morton Salt* presumption with facts of actual injury, 842 F.2d at 1041, while Texaco failed to demonstrate the absence of such injury. Under the circumstances, there is no reason to reconsider the efficacy of a presumptive rule that has worked well for forty years.

[20]The *Moss* rule for *seller* liability was cited with approval by this Court in *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 78–79, 79 n.22 (1953), although it was rejected for use to establish *buyer* liability.

CONCLUSION

For the foregoing reasons, the Amici States urge this Court to continue to approve enforcement of the Robinson-Patman Act against unjustified price discrimination favoring wholesalers over direct-buying retailers where it is reasonably possible that competition will suffer. The Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

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(12)

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO, INC.

Petitioner,

vs.

RICKY HASBROUCK, d/b/a
RICK'S TEXACO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS IN SUPPORT OF PETITIONER

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July 31, 1989

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QUESTION PRESENTED

This case presents a question which goes to the very heart of the legislative objectives of the Robinson-Patman Act. The question that is of vital interest to the wholesale-distribution industry is:

> Whether the Robinson-Patman Act is violated by a manufacturer who sells goods to wholesalers at a lower price than to retailers.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

National Association of Wholesaler-Distributors, a national trade association, respectfully moves this Honorable Court for leave to file amicus curiae brief in support of Petitioners. The attorney of record for the Petitioner has consented to such filing. The attorney of record for Respondents has declined to consent to such filing.

The National Association of Wholesaler-Distributors (NAW) is a federation of approximately 116 national wholesale distribution trade associations, 54 state and regional trade associations and some 2,000 individual wholesale distribution firms, representing in the aggregate, over 40,000 wholesale distribution companies nationwide.

Wholesale distribution is an enormous and economically potent industry with 1986 sales in excess of two trillion dollars. The industry employed approximately 5.8 million persons in that year.

While the composite sales and employment statistics attest to the vital role of wholesale-distribution, the fact is that the vast majority of firms in the industry tend to be small to medium, closely-held, family owned businesses, the very type of business for which Congress enacted the Robinson-Patman Act in order to restore equality of opportunity in the marketplace.

While the movement of goods is their primary purpose, wholesale-distributors inevitably offer marketing, financial and logistical support to both suppliers and customers as a natural part of the wholesale distribution process.

The typical wholesaler-distributor establishes a market connection among hundreds of manufacturers and customers. Many of these manufacturers must rely on wholesaler-distributors as their sole access to the market, as the entity through which they create and nurture a relationship with their customers. In this way, the wholesaler-distributor is a critical factor in the U.S. economy. (*Facing the Forces of Change*, Arthur Andersen & Co., published by Distribution Research and Education Foundation, 1987)

The decision in this case is one which transcends in importance the interest of the immediate litigants. As the principal voice of wholesale distribution the amicus is well suited to present to the court the effect on the wholesale distribution industry of the decision of the Ninth Circuit Court of Appeals which ignores the role of the wholesaler-distributor as the central link in the distribution process by effectively eliminating the wholesaler's distribution allowance.

Therefore, amicus respectfully requests leave to file instanter its brief urging reversal of the decision of the United States Court of Appeals for the Ninth Ciruit, and in support of Texaco, Inc., Petitioner herein.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE
NATIONAL ASSOCIATION
OF WHOLESALER-DISTRIBUTORS

SUMMARY OF THE ARGUMENT

I.

The Robinson-Patman Act does not prohibit a seller from offering different prices to purchasers at different levels within the chain of distribution. A distribution allowance granted to a wholesaler by a manufacturer reflects the business judgment of the manufacturer as to the value of the vital functions performed by wholesalers. Such price differentials need not be cost justified since no injury is likely to occur to

direct buying retailers who do not perform the various functions rendered by wholesalers. Wholesalers perform numerous functions which add value to the manufacturer's product. A precise accounting of the value of the performed functions is not mandated. The decision of the Ninth Circuit below represents an attempted adoption of a construction of the Robinson-Patman Act that was discredited almost immediately after it was propounded. Case law establishes the fundamental doctrine that the Act is intended to protect those who sell at the same functional level.

II.

The attempted resurrection of the *Doubleday* theory in the instant case should be rejected. The competitive position of a buyer in the chain of distribution will be determined by the manner in which it resells rather than purchases the product. The decision of the Ninth Circuit is one that penalizes efficiency and promotes upward price stabilization. The Act is not violated where a manufacturer sells to wholesalers at a lower price than to retailers.

ARGUMENT

I

THE NINTH CIRCUIT INCORRECTLY CONCLUDES THAT A SUPPLIER WHO SELLS AT UNIFORM PRICES TO PURCHASERS AT THE SAME FUNCTIONAL LEVEL IN THE CHAIN OF DISTRIBUTION MAY BE LIABLE UNDER THE ROBINSON-PATMAN ACT IF THE DISCOUNT AFFORDED IS NOT COST BASED AND PART OF IT IS PASSED ON TO CUSTOMERS OF THE PURCHASERS WHO COMPETE WITH OTHER CUSTOMERS OF THE SUPPLIER.

As an *amicus*, NAW feels that it would be unavailing, if not pretentious, for it to discuss, in other than general summarized form, the specific facts bearing upon the legal issues in this case. As far as NAW is concerned, its sole objective in filing this *amicus* brief is to sustain the established law that there is no Robinson-Patman Act liability where a supplier sells at uniform prices to purchasers at the same functional level in the chain of distribution.

To aver that the Act applies in a different manner is to eschew reason. Such a position can only be construed as an attempt to ask this Court to entertain a radical departure from established law, one that would strip the venerable principle of *stare decisis* of its vitality and would seriously injure the large number of businesses engaged in the wholesale-distribution industry which have relied upon and honored the applicable law since the birth of the Robinson-Patman Act.

In responding to the questions of the jury, the trial court incorrectly applied the law in limiting the issue to be decided by the jury. In its direction to the jury that the *only* issue to be decided by that jury was whether gasoline had been sold at a cheaper price to two wholesalers than the price charged to the retailers involved in the case, the trial court incorrectly applied current law.

In upholding the substance of the response of the trial court to the question of the jury, the Ninth Circuit decision is equally inconsistent with comparable cases dealing with that issue.

Especially pertinent here is the decision of the court in *FLM Collision Parts* v. *Ford Motor Co.*, 543 F.2d. 1019, 1024 (2d Cir. 1976) *cert denied*, 429 U.S. 1097 (1977) in which the court stated:

> "(The Act) does not prohibit the seller from offering different prices to each of its purchasers, such as one price when he functions as a retailer and a lower price when he functions as a wholesaler, provided all competing purchasers are treated equally."

That Congress intended such differentials is clear. In *H.R. Rep. 2287, 74th Congress, 2d Session, 8-9 (1936)*, the report explains the pertinent provisions of the Act that expressly permit "price differentials" depending solely upon whether the purchaser buys for resale to wholesalers, to retailers, or to customers, or for use in further manufacture.

Congress viewed the Robinson-Patman Act as raising no obstacle to using the most efficient and economical methods of production, sale or distribution. Nor did Congress view "functional discounts" with suspicion. *The Legislative History of the Federal Antitrust Laws and Related Statutes*, E. Kintner, (1978)

Manufacturers and retailers recognize that wholesalers provide valuable services to them. Wholesalers provide services to manufacturers which, if they did not exist, would have to be provided by the manufacturers. Wholesale distribution produces economies of scale of such magnitude as to present the basic groundwork for increases in national productivity. American productivity currently is bounding ahead in only a few key businesses, one of which is wholesale trade. *America Still Reigns in Services*, Sylvia Nasar *Fortune*, June 5, 1989, P.65.

The differences in prices charged by a manufacturer to a wholesaler reflect the business judgment of that manufacturer as to the value of the marketing function performed by that wholesaler. Value becomes a matter of utility, of time and place, and of need, all of which are variables, and which will have such value placed upon them by the manufacturer as is considered appropriate by that manufacturer for the economic value received. To portray such price differentials as "functional discounts" is to prolong a serious misnomer. It is much more accurate to describe the price differential as what it actually is — the distribution allowance. Such an allowance is determined by the manufacturer, taking into account the fundamental economic value of the wholesaler in the distribution system. Charging different prices to customers at different levels of competition reflects a recognition of the economic realities of distribution. There is no general principle of antitrust law that forbids charging such different prices. *USM Corp.* v. *SPS Technologies, Inc.*, 694 F.2d. 505, (7th Cir., 1982) Cert. Denied 462 U.S. 1107, (1982)

Such price differentials, often referred to, albeit incorrectly, as "functional discounts", are granted in recognition of the purchaser's function and position in the chain of distribution.

The critical issue as clearly stated by this Court in *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 475 (1952) is not the functional label under which customers are classified but whether the customers in fact compete. The true test and the only objective means of determining the applicability of Robinson-Patman proscriptions against unlawful price discrimination is the level of competition of the purchasers. For the statute to be applicable, the favored customers must be competitors of the plaintiff. *Centex-Winston Corp.* v. *Edward Hines Lumber Co.*, 447 F.2d. 585, 7th Cir. (1971). The evil at which the Robinson-Patman Act is aimed is discrimination between

different competing purchasers. *Hartley & Parker, Inc.* v. *Florida Beverage Corporation*, 307 F.2d. 916, 5th Cir. (1962). There is no violation unless discrimination is "in price between different purchasers" on the same level of competition. *American Oil Co.* v. *McMullin*, 508 F.2d. 1345, (10th Cir. 1975).

In each of these cases and in all such cases that have correctly interpreted the pertinent provisions of the Robinson-Patman Act as to price differentials between non-competing purchasers, there is the implicit recognition of the vital role of the wholesaler in the chain of distribution.

It is of telling importance that the decision below does not adequately discuss nor take appropriate cognizance of the wholesaler's role in the distribution process. The decision of the court below, based as it is upon the narrow issue of a cost base for a discount, fails to provide for consideration of the benefits derived from the services performed by wholesalers for each segment in the chain of distribution. In so narrowing the boundaries for issue analysis, the court incorrectly applies current law and fails to include material matters in its analytical process, namely, the function of wholesale-distribution in the marketing chain.

Because the term "discount" is often, albeit incorrectly, used in describing the distribution allowance paid to a wholesaler for its services, there is often confusion as to the unique relationship of wholesalers to manufacturers and to retailers in the chain of distribution.

The word "discount" is both ambiguous and pejorative. It is commonly considered as that amount which is taken off for prompt payment, or as a sales incentive, or for moving damaged goods. In this sense, wholesalers are incorrectly seen as mere buyers from a manufacturer.

Obviously, this is much less than meets the eye. As wholesalers market products to customers more cost-effectively than manufacturers, they are earning a share of their cost-effectiveness, not a discount.

The term that more aptly describes the wholesaler's compensation is a distribution allowance, because the costs of a wholesaler's added value to a manufacturer's products can be compared with the other expenses on their earnings statements rather than as a discount from their sales revenues. Manufacturers do not lose part of their revenues to the wholesaler; instead, in utilizing wholesalers, manufacturers add value to their products at less cost.

In a number of vital functions, the wholesaler brings to a manufacturer important advantages in cost that a manufacturer cannot usually achieve on its own, including transportation, storage, financing, risk-taking, product servicing, selling, market information and product development. *Superconductive Ideas*, by Louis H. T. Dehmlow, (1988).

In transportation, a manufacturer using a wholesaler can make a few large shipments rather than many small ones. The economies of scale require fewer factories shipping bulk quantities of limited products to be delivered in concentrated areas at regular intervals.

In storage, wholesalers relieve their manufacturers of finished product inventories by taking title to those products, and storing them in widely dispersed locations in many markets.

In financing, the manufacturer establishes a few credit contacts with several wholesalers rather than tens of thousands of smaller as well as hundreds of larger users. The wholesaler often has a stronger credit position than many of his customers, so the manufacturers risk fewer bad debt losses on

accounts receivable. Moreover, the employees of wholesaler firms live with their customers in their own local vicinity, and maintain much closer contact.

In risk bearing, wholesalers assume the risks involved with inventories and accounts receivable — i.e., the risks of falling prices, product deterioration and obsolescence associated with handling inventory, as well as the risks of bad-debt losses and inflation in handling accounts receivable.

In product servicing, because industrial and commercial products today are often complex, adequate knowledge and service must follow up sales. Without wholesalers, manufacturers would have to maintain extensive field organizations and the associated costs of such structures.

In selling, wholesalers supply a well-trained sales force which contacts small and widely dispersed customers with greater frequency than can be done by a manufacturer alone.

In market information, wholesalers have a major advantage. Because of the close contact with both customers and the suppliers of many products, the wholesaler is in the best position to determine factors involved with supply and demand in the market, and to pass such information on to his manufacturer-suppliers.

Sales to wholesalers by manufacturers must, of necessity, recognize the value-added. Sales to wholesalers at lower prices than to retailers (who do not perform the same functions, or else, such retailers would, in fact, be wholesalers) enables wholesalers to perform their functional role in reselling to retailers. Earning a profit is not a violation of the Robinson-Patman Act. The distribution allowance provides the efficient wholesaler the opportunity for profit and the consumer the opportunity for lower prices. Exclusive cost basis evaluation as dictated by the trial court in the instant

case penalizes the most efficient in the chain of distribution and exacts substantial retribution on consumers while doing nothing to preserve and protect competition.

The price differentials offered to wholesalers are a traditional pricing technique by which suppliers compensate for distributive services. Such price differentials need not be cost justified, since no injury is likely to occur to direct buying retailers who are required to pay a higher price and who do not perform the various functions of distributive services.

The legitimacy of a price differential to a wholesaler is to be judged by examining the capacity in which the buyer resells rather than how it buys. *Boise Cascade Corp.*, 107 F.T.C. 76, 211, *rev'd and remanded* 837 F.2d 1127 (D.C. Cir. 1988).

Actual competition in resale operations is decisive, rather than nomenclature. Ambiguous labels which might be used to cloak illegal discriminatory discounts to favored customers are and should be disregarded. *F.T.C.* v. *Ruberoid*, 343 U.S. 470, (1952). The FTC has advised that the controlling element is whether or not resale competition actually exists as between and among various resellers rather than the names they use to describe themselves. *FTC Advisory Opinion, File No. 683 7092, released March 14, 1968*. If in fact there is competition at the same level of distribution, that fact, and not the titles used, determines the legality under Robinson-Patman of price differentials offered.

The actual functions performed, not the cost of such functions, is the only acceptable objective test for determination of Robinson-Patman liability.

If the question to be decided in determining the legality under the Robinson-Patman Act is whether the cost of services performed by the purchaser is substantial and whether some part of that differential is passed on to customers of such purchaser, it postulates a legal fiction.

There is no authority for the proposition implicit in the decision of the court below that a supplier must undertake affirmatively to monitor the costs and the pricing policies of wholesalers to which it offers a price differential based upon the purchaser's level of competition. Authority is very definitely the opposite. *Mueller Co.*, 60 F.T.C. 120, 1962, *aff'd*, 323, F.2d. 44 (7th Cir. 1963), *cert denied* 377 U.S. 923, (1964). See also *Dart Industries* v. *Plunkett Co.*, 704 F.2d. 496 (10th Cir. 1983); *Boise Cascade Corp.* v. *FTC*, 107 F.T.C., 76 (1986), *rev. and remanded*, 837 F. 2d. 1127 (D.C. Cir. 1988); *Best Brands Beverage, Inc.*, v. *Falstaff Brewing Corporation*, 842 F.2d. 578 (2d Cir. 1987).

To require the seller to inquire into the costs and pricing strategies of the wholesaler in order to avoid Robinson-Patman liability would penalize efficiency and discourage price competition. Instead price differentials to wholesalers reflect the judicially and legislatively recognized fact that the wholesaler does provide a major role in the chain of distribution and that such differentials are intended to reflect, from an economic view, the supplier's estimate of the value of the functions performed by the wholesaler. Supplier's are free under the provisions of the Robinson-Patman Act to grant such price differentials on an equal basis to its customers who compete at the same level of distribution. *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, (1952).

A precise accounting of the value of the performed function is not mandated. The issue in this case is not the narrow question of whether a price differential is passed on, a particularly incongruous position which rewards inefficiency and inevitably produces only self-defeating, and non-competitive consequences. The real issue in this case is without question of major national significance. It is a question of whether the Act shall continue to be utilized as a vehicle for the protection and promotion of competition. The decision below represents

a new construction of the Robinson-Patman Act, a construction that was first propounded in 1955 but which was almost immediately discredited and which has not been followed during the life of the Act. Case law is abundant in establishing the fundamental doctrine that the Robinson-Patman Act is intended to protect those who sell at the same functional level.

II

THE ROBINSON-PATMAN ACT IS NOT VIOLATED WHEN A MANUFACTURER SELLS TO WHOLESALERS AT A LOWER PRICE THAN RETAILERS

The decision of the Ninth Circuit in this case has resurrected a long-ago decided battle involving competing theories of Robinson-Patman ideology. The combatants in this battle are the theories espoused in *Doubleday & Co.*, 52 F.T.C. 169 (1955) versus *Mueller Company*, 60 F.T.C. 120 (1962), *aff'd*, 323 F. 44 (7th Cir., 1963).

The Ninth Circuit Decision attempts to reinstate the discredited proposition that a discounted price to a wholesaler must be cost justified *and* concludes that where that discount or any part of it is passed on to customers of that wholesaler, the harm to competitors of such customers can be utilized as evidence of the requisite harm to competition.

Thus, the Court searched back into history and attempted for still another time to adopt the doctrine of the *Doubleday* case. That case held that a discount that equals the buyers expense in rendering services is incapable of producing competitive injury or that it is justifiable and lawful *irrespective of such injury, thereby* ignoring the basic foundation of the Robinson-Patman Act.

Under *Doubleday*, decided in 1955, no injury to competition under Section 2(a) will result because of a buyer's receipt of a

discount from a supplier if the discount simply compensates the buyer for services it performs for the benefit of the supplier. That case was overruled rather quickly but subtly in 1956 in *FTC v. General Foods Corp.* 52 F.T.C. 798, (1956) where the Commission looked to the level of competition of the buyers to determine legitimacy of price differentials under the Act. The *Doubleday* doctrine was very firmly overruled in the *Mueller* case decided in 1962 where the Commission held that the principles articulated in *Doubleday* had been overruled, *sub silentio*, in the *General Foods* case.

The Commission in the *Mueller* case adopted a rule which holds that the position of a buyer in the chain of distribution will be determined by the manner in which it resells, rather than purchases, the product.

Under the *Mueller* doctrine, recently reaffirmed by the Commission in *Boise Cascade Corporation v. FTC* 107 F.T.C. 76 (1986) *rev'd and remanded* 837 F.2d. 1127 D.C. Cir., (1988), the Robinson-Patman Act is determined to protect competition among those who sell at the same functional level. Manufacturers are permitted to use price differentials, commonly known as a wholesale or functional discount (but more appropriately identified as a distribution allowance) to compensate certain classes of *buyers* for the distributional services they perform. *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, (1948).

In its decision in the instant case, the Ninth Circuit has once again attempted to resurrect the *Doubleday* doctrine out of its appropriately directed burial ground, stating:

> "(3) That all wholesalers were offered the same discount would be an appropriate defense in a case where the plaintiff and the other customers of the defendant were all wholesalers performing at the same level in the chain of distribution. Here, however, only the other customers are wholesalers; the

plaintiffs are retailers who are further down the chain the distribution. *The inquiry occurs at the latter level and results from the receipt by wholesalers of a functional discount in excess of the value of the services they perform, all or a portion of which they then pass on to the retailers they supply.* (emphasis supplied)

"As the Supreme Court long ago made clear, and recently reaffirmed, there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers. *Morton Salt*, 334 U.S. at 43-44; *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 646-47(1969); *Falls City Indus., Inc.* v. *Vanco Beverages, Inc.*, 460 U.S. 428, 434-35 (1983). *Despite the fact that Dompier and Gull, at least in their capacities as wholesalers, did not compete directly with Hasbrouck, a section 2(a) violation may occur if (1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with Hasbrouck*". Pet.App. 7-8. (emphasis supplied)

Thus, the Ninth Circuit in this case has clearly adopted the position that a seller may only grant a discount to a wholesaler where the discount compensates the purchaser for costs incurred on behalf of the seller and where some part of that discount is passed down into the chain of distribution, a violation of the Act will occur. This theory is merely a clone of *Doubleday* and does not recite a correct statement of applicable law under the Robinson-Patman Act.

This attempted adoption of the discredited *Doubleday* theory by the Ninth Circuit in this case brings the issue of functional discounts to the forefront. Functional discounts, more

accurately called distribution allowances, are a basic ingredient in the wholesale-distribution industry. They were well established as accepted pricing methods at the inception of the Robinson-Patman Act. The adoption of the *Doubleday* theory by the lower Court in this case threatens a state of chaos for suppliers and wholesalers alike and the very existence of the unparrelled and highly efficient distribution system which exists today in this country.

Such price differentials have been and continue to be a traditional pricing technique through which sellers compensate buyers for performing the distribution function.

The question to be addressed is who is entitled to the price differential and in what amount. In *Doubleday*, the Federal Trade Commission attempted to formulate some method to answer this question by shifting the focus of the inquiry from the purchaser's method of resale to his buying function. "Where a businessman performs various wholesaler functions, such as providing storage, traveling salesmen and distribution of catalogs, the law should not forbid his supplier from compensating him for such services." *Doubleday*, supra, at 209.

Commissioner Secrest, although concurring with the result in *Doubleday*, correctly foretold of the enormous difficulties such an approach would bring to the marketplace when he stated:

> "Functional classification of customers for discount purposes should be conditioned on their character as sellers, not on the performance of any services to their supplier. To hold otherwise would lead to pricing by individual customers which would undoubtedly give the larger buyer a price advantage in the resale of the seller's goods." 52 F.T.C. Dec. at 211.

The Commission was again confronted with the issue of how to determine who is entitled to price differentials when it heard the *Mueller* case. In reviewing the opinion in *Doubleday* the Commission reversed itself:

> "The other interpretation, that injury will not result from a functional discount 'reasonably related to the expenses assumed by the buyer', ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller. Consequently, we disagree with both interpretations and, insofar as the language in *Doubleday* stands for either of them, it is rejected." 60 F.T.C. at 127.

Since *Mueller*, the focus of inquiry has been on the purchaser's capacity as a seller of the product rather than on how it is purchased.

The conflict between *Mueller* and *Doubleday* was recently reviewed at length in the case of *Boise Cascade Corporation* v. *Federal Trade Commission*, 107 F.T.C. 76 (1986), *rev'd and remanded* 837 F.2d 1127 (D.C. Cir. 1988). In commenting, the Court in that case noted the difficulty in attempting to enforce the decision:

> "This contrary (soon to be called Mueller) principle was thus informed by both instrumentalist and conceptual concerns: the *Doubleday* rule would be an immense headache to administer, and the rule would justify a discount where the buyer, by providing such services, was improving its own competitive position with other buyers. And this latter reality raised the spectre of Robinson-Patman's core concern for little fish competing with whales (or at least larger fish). *Doubleday's* rule, in short,

> "would undoubtedly give the larger buyer a price advantage in the resale of the seller's goods." 837 F.2d. 1127 at 1141.

Any interpretation of the Robinson-Patman Act which creates a cost-base justification coupled with a pass-on requirement, as the Ninth Circuit decision would do, is one that penalizes the efficient and promotes upward price stabilization, while actually working to reduce competition, the complete antithesis of the intent of the framers of the Act.

Today, we live in what can most accurately be described as the "age of distribution". More workers are employed in the transportation and distribution of goods and services than in any other segment of the U.S. economy. The Robinson-Patman Act, enacted to preserve, protect and to *promote* competition has accomplished its goal. Although it introduces a complexity in day to day operation of a business that is often perplexing to all parties coming in contact with the provisions of the Act, it has withstood the test of time and efficacy. As correctly interpreted under *Mueller* and by a long line of cases upholding the competitive preservation and promotion resulting from such an application of the law, the Act has supplied and continues to supply the supportive legal tools to meet the modern demands of distribution.

The *Doubleday* doctrine does not meet the requirements of the Act nor does it meet the requirements of our highly competitive modern distribution system. In *Eximco, Inc.* v. *Trane Co.*, 737 F.2d. 505 5th Cir. (1984), the U.S. Court of Appeals for the Fifth Circuit recognized the Act as a statement of economic policy, citing almost a half century of interpretative case law, economic analysis and commentary under which the Act has been illuminated. In that light, said the Court, we must examine section 2(a) in view of sound economic theory and attempt to effectuate as much as possible the somewhat

paradoxical intent behind the Robinson-Patman Act which is to promote competition by protecting competitors. (*Eximco*, at p. 514-515).

The lesson of the long line of cases upholding *Mueller* is that sellers are required under the Robinson-Patman Act to treat equally those who actually compete on the same level of distribution. The Act is not violated where a manufacturer sells to wholesalers at a lower price than to retailers.

CONCLUSION

It is respectfully submitted that the Robinson-Patman Act is not violated by a manufacturer who sells goods to wholesalers at a lower price than to retailers; that the Ninth Circuit Court of Appeals decision is not a logical and reasonable determination of applicable law; and that the decision should be reversed.

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Supreme Court, U.S.
FILED
AUG 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TEXACO, INC.,
Petitioner,
v.
RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE MOTOR AND EQUIPMENT MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER TEXACO, INC.

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MOTION OF MOTOR AND EQUIPMENT MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER TEXACO, INC.

Pursuant to Supreme Court Rule 36.3, the Motor and Equipment Manufacturers Association ("MEMA") respectfully moves for leave to file the attached *amicus curiae* brief in support of petitioner Texaco, Inc. MEMA requested the consent of Texaco, Inc. and respondents Ricky Hasbrouck, *et al.* to the filing of this brief. Texaco, through counsel, gave its consent, but respondents, through their counsel, declined to give theirs.

MEMA is a trade association representing the interests of over 750 manufacturers of automotive original equipment and replacement parts. Founded in 1904, MEMA is the oldest trade association in the U.S. automotive industry, and it is the only association devoted exclusively to representing and serving the needs of U.S.

manufacturers of automotive parts, equipment, accessories, and allied products.

The American motoring public has long become accustomed to the ready and wide availability of automotive replacement parts regardless of a motor vehicle's age, make and model, or the geographic remoteness of the motorist. To meet that expectation, a complex distribution system for replacement automotive parts has evolved under which manufacturers use a number of channels and subchannels of distribution for products and charge varying prices tailored to functions performed by customers at each distribution level.

The decision below, if affirmed, will have an extremely adverse impact on one of the most efficient distribution systems in the world because, if upheld, it could severely restrict or eliminate functional discount pricing, upon which that system is based. MEMA believes that its participation in this case as *amicus curiae* will provide this Court with an important perspective on the issues raised by the decision below and its impact upon a consumer-responsive distribution system which has proven efficient and effective.

MEMA's proposed brief is attached.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE MOTOR AND EQUIPMENT MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER TEXACO, INC.

The Motor and Equipment Manufacturers Association ("MEMA") respectfully submits this brief as *amicus curiae* in support of petitioner Texaco, Inc.

INTEREST OF AMICUS CURIAE

MEMA is a trade association representing the interests of more than 750 manufacturers of automotive original equipment and replacement parts. Founded in 1904, MEMA is the oldest trade association in the U.S. automotive industry, and is the only association devoted exclusively to representing and serving the needs of U.S. manufacturers of automotive parts and allied products.

Manufacturers of automotive replacement parts face the daunting task of assuring that replacement parts for

virtually every vehicle make and model are readily and widely available throughout the United States in service stations, car dealerships, general repair shops and retail outlets such as discount stores and a variety of volume retailers. This requires the maintenance of a massive, costly inventory, which is almost always experiencing some obsolescence and needs constant replenishment.

To assure that millions of replacement parts are available wherever and whenever the American motorist needs them, an intricate distribution system has evolved under which manufacturers use a number of intermediate channels and subchannels of distribution, such as warehouse distributors, jobbers, dealers, and retail accounts that make replacement products available to consumers. These distribution channels and subchannels perform various redistribution, warehousing, and related functions that assure the availability of these products to meet consumer needs whether those needs are satisfied by repair shops or on a do-it-yourself basis. The functions performed at each level of distribution are integral to the operation and efficiency of the overall system.[1] The price differences that exist reflect the functional differences between the different distribution levels and have been an important hallmark of the automotive replacement parts distribution system and its successful operation for many years.

This distribution system—one of the most efficient in the world—has evolved in response to consumer demand

[1] A typical warehouse distributor, for example, maintains warehouses in which a large quantity and wide variety of automotive parts of different manufacturers are stored. Warehouse distributors frequently deliver product directly to their customers and often have a sales force that visits customers to provide ordering and promotional assistance. They also extend credit. Thus, warehouse distributors perform vital functions in the distribution process, and have large investments in warehouses, trucks, sales forces, and credit to their customers.

and the expectation that the American motoring public should be able to obtain any part for almost any vehicle anywhere in the country. The system has worked efficiently for decades, and is continuing to evolve in response to consumer demand and market forces.[2]

The decision below, by establishing an unworkable standard for granting functional discounts, threatens to undermine this demonstrably efficient distribution system, and may expose auto parts manufacturers to treble damages for what has for decades been regarded as a customary and legitimate method of doing business.

According to the court below, Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), may be violated if a manufacturer grants a discount to a distributor that exceeds the cost of the distributing functions performed, and if the manufacturer does not police the distributor's resale prices to assure that no part of the discount is passed on to the distributor's customers. *Has-*

[2] The automotive replacement parts distribution system and the "competitive-functional pricing" in that system are described in detail in C. Davisson, *The Marketing of Automotive Parts* (1954). Professor Davisson describes the intense competition in the industry, the industry's sensitivity to market demands, and the importance of functional pricing in assuring the widest distribution of product:

> . . . individual sellers must strive to price so that satisfactory volume is obtained from each of several channels used. . . . The objective is to provide margins sufficient to assure sales through each of several channels used. *Functional pricing rests on the reasoning that the vendor is "buying distribution" by accepting different nets from accounts which differ in trade status.*

Id. at 39 (emphasis in original).

Competition among companies at each functional level of distribution tends to reduce these margins to a point approaching the costs of performing the distribution functions. *See id.* at 953. In short, the automotive parts distribution system and the functional discounts upon which that system is based reflect the free interplay of market demands and interests.

brouck v. Texaco, 842 F.2d 1034, 1039 (9th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3812 (U.S. June 13, 1989) (No. 87-2048). The court of appeals' decision superimposes upon the Robinson-Patman Act a "cost-based" requirement totally at odds with the long-standing interpretation of the Act and the policy behind it. It would be virtually impossible for MEMA members to ascertain the costs of each direct customer in the vast distribution system for automotive replacement parts. Even if such a "cost-based" requirement could be met, the resulting price differences to different distributors (which are later construed to be at the same level) based on their costs might expose the manufacturer to potential liability under the Robinson-Patman Act. Moreover, the court's directive that manufacturers monitor their distributors' resale prices raises serious issues of resale price maintenance, a *per se* violation of the Sherman Act § 1, 15 U.S.C. § 1.

Under these circumstances, an undesirable result of the decision below may be the severe restriction or elimination of functional discounts. Manufacturers could be forced to sell to all distribution levels at uniform prices, with the likely results being stabilized prices, the elimination of certain functions and services, and the end of the ready availability of automotive replacement parts in this country. MEMA members respectfully submit that the decision below threatens to jeopardize the efficient system by which automotive replacement parts have been distributed in this country for many years.

SUMMARY OF ARGUMENT

Congress intended the Robinson-Patman Act to assure fair competition among businesses at the same level of distribution. The Act's prohibition of price discrimination therefore does not apply where a seller's use of functional discounts results in different prices to customers at different levels of distribution. The Act does not impose a "cost-based" requirement as a precondition to providing such functional discounts.

By requiring that functional discounts be "cost-based," the court below would seem to require sellers to set their prices on the basis of information that they do not know and cannot accurately determine. Moreover, by requiring that sellers prevent their customers from "passing on" to subsequent purchasers any portion of a functional discount, the decision may expose sellers to treble damage liability for the pricing decisions of independent distributors—a result that is antithetical to the underlying policies of the antitrust laws. In short, under the Ninth Circuit's interpretation of Section 2(a), the legality of functional discounts seems to depend upon what a manufacturer does not know and cannot control—each customer's costs and independent pricing decisions. Such requirements do not find support in the Act or the policy behind it, are unworkable as a practical matter, and could result in the demise of functional discounts, to the detriment of the American consumer.

ARGUMENT

I. FUNCTIONAL DISCOUNTS DO NOT VIOLATE SECTION 2(a) OF THE ROBINSON-PATMAN ACT AND ARE NOT DEPENDENT UPON ANY COST-BASED JUSTIFICATION

Functional discounts have been an important part of the American economy since well before passage of the Robinson-Patman Act in 1936. *See* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* at 3-6 (1962); *Boise Cascade Corp.*, 107 F.T.C. 76, 209 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). Nothing in the language or the legislative history of the Robinson-Patman Act suggests that Congress intended to alter the time-honored practice of providing functional discounts. Indeed, one of the principal purposes of the Act was to preserve multi-level distribution systems by preventing powerful, direct-buying retail chains from inducing and receiving discriminatory price advantages over

their rivals who purchased from wholesalers. *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess., pt. 1, at 3-6 (1936) *reprinted in* 4 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes Part I* 3183-86 (1980). This Court has described the Congressional intention underlying the statute as follows:

> In short, Congress intended to assure, to the extent reasonably practicable, that businessmen *at the same functional level* would start on equal competitive footing so far as price is concerned.

F.T.C. v. Sun Oil Co., 371 U.S. 505, 520 (1963) (emphasis added).

Consistent with that Congressional purpose, the courts and the Federal Trade Commission have established that the Robinson-Patman Act does not preclude a supplier from offering different prices to companies at different levels in the distribution chain because of the absence of any adverse effect upon competition. One of the clearest statements of this proposition is found in the opinion of Commissioner Elman in *Hruby Distrib. Co.*, 61 F.T.C. 1437, 1446-47 (1962):

> In its Section 2(a) price discrimination cases the Commission has long recognized the legality of price differences based upon differences in the level of distribution of the customers who are charged disparate prices. The lawfulness of such functional price differences derives from the fact that they result in no adverse economic effects upon particular competitors or competition in general.

Courts have confirmed the legality of differences in prices charged by a seller to two customers performing different functions. *See, e.g., White Indus. v. Cessna Aircraft Co.*, 845 F.2d 1497, 1499-1500 (8th Cir.), *cert. denied*, 109 S. Ct. 146 (1988); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Energex Lighting Indus. v. North American Phillips Lighting Corp.*, 656 F. Supp. 914, 920 (S.D.N.Y. 1987).

The court of appeals' decision below radically departs from established precedent by erroneously imposing a "cost-based" requirement as a precondition to providing functional discounts and requiring that manufacturers monitor their distributors to assure that non-cost-based discounts are not passed on to the distributor's customers.

The court's reliance upon *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), to support these requirements for the grant of a functional discount is misplaced. The Ninth Circuit erroneously seized upon the concept of the "pass on" of the discount from the favored wholesaler to the next two levels of distribution in *Perkins* and applied it to the entirely different facts of this case, where the favored and disfavored buyers operated at different functional levels, and where the "pass on" was the result of independent pricing decisions.[3] The *Perkins* Court was correctly concerned that the defendant should not be able to avoid liability "by the simple expedient of adding an additional link to the distribution chain." 395 U.S. at 647. In the instant case, in contrast to *Perkins*, the "pass ons" of functional discounts were the result of the pricing decisions of independent entities.

The main thrust of the *Perkins* case was the expanded definition this Court gave to the word "customer" under Section 2(a). *Perkins* does not support the lower court's "cost-based" and policing requirements as preconditions to the granting of functional discounts. These cumbersome and unworkable preconditions are fundamentally

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[3] In *Perkins*, the plaintiff was a wholesaler and retailer of gasoline purchased directly from Standard Oil, the defendant refiner. 395 U.S. at 644. Perkins alleged that Standard had sold gasoline to the favored buyer, Signal Oil & Gas Co., which then passed those lower prices on to its 60-percent-owned subsidiary, Western Hyway, which in turn passed the lower prices on to Regal Stations, a 55-percent subsidiary of Western. 395 U.S. at 647-48. Thus, in *Perkins* the same functional level was involved, and Signal, by virtue of its ownership interests, in effect controlled the next two levels of distribution, including the retail outlet.

at odds with any coherent and consistent interpretation of the Robinson-Patman Act and its legislative history.

II. THE COURT OF APPEALS' DECISION IS UNWORKABLE AND REFLECTS UNSOUND ANTITRUST POLICY

The decision below apparently requires manufacturers to establish for each customer that a functional discount is "cost-based" and to police distributors' resale pricing to prevent them from passing on any part of a non-cost-based discount. The former prerequisite is unworkable as a practical matter. The latter one, which seeks to have manufacturers intrude upon the pricing decisions of independent wholesalers, is antithetical to the antitrust policy that encourages price competition, and may expose manufacturers to treble damage liability for resale price maintenance. The court of appeals' requirements for functional discount pricing could force manufacturers to adopt uniform prices for all customers, regardless of their level of distribution and the functions they perform.

A. The "Cost-Based" Requirement Is Unworkable

Although the decision below is unclear as to whose costs must be included—the manufacturer's or distributor's—in the newly-created "cost-based" requirement for functional discounts, the decision appears to focus on the distributor's costs of performing functions. *Hasbrouck v. Texaco*, 842 F.2d at 1029. Automotive parts manufacturers cannot establish and maintain a pricing structure in which each individual distributor's discount is equivalent to the costs of the functions it performs; manufacturers do not have access to their customers' costs to be able to quantify them. Moreover, each customer's costs are different (based upon a number of variables within each customer's independent discretion), and will change over time. For example, the following factors, among

others within each distributor's discretion, will determine a distributor's costs: the location and number of warehouses or outlets; what and how many products are maintained in inventory; the number of days the product is stored prior to resale; the size of the distributor's staff and their compensation and training; to whom credit is extended and how much; how often deliveries are made by the distributor to its customers; the level of product promotion and the marketing assistance provided to customers; and the *pro rata* share [4] of all other fixed and variable costs associated with storing, delivering, promoting, and selling a given product.

Assuming for purposes of argument that manufacturers could somehow correlate each customer's costs with the discounts given, the resulting price differences to different distributors at the same level based on their costs could expose manufacturers to a potential violation of Section 2(a) of the Robinson-Patman Act. *See Boise Cascade*, 107 F.T.C. at 212. Moreover, such a variable discount system may reward the most inefficient wholesalers, *i.e.*, those with the highest costs—"an economically unfortunate reversal of desired incentives." *Id.*

B. The Decision Below Reflects Unsound Antitrust Policy And May Have Adverse Consequences For Consumers

The Ninth Circuit's decision may expose manufacturers to treble damage liability because it requires them to monitor and control the pricing decisions of their distributor customers over whom they exercise no control. This Court recently has affirmed the long-standing principle that resale price maintenance is *per se* illegal under the Sherman Act § 1, 15 U.S.C. § 1. *Business Elec.*

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[4] Warehouse distributors and jobbers typically carry automotive replacement parts of many different manufacturers, making it extremely difficult, if not virtually impossible, to apportion costs among them.

Corp. v. Sharp Elec. Corp., 108 S.Ct. 1515, 1519 (1988). By requiring manufacturers to involve themselves in a distributor's independent pricing decisions, the decision below in effect condones resale price maintenance activity.

The lower court's holding jeopardizes the system of multi-tiered distribution of automotive replacement parts, and may leave manufacturers with no workable or legally safe means to compensate wholesale distributors, jobbers, or dealers for the critical functions they perform in assuring the ready availability of parts to consumers. If the decision below stands, the result may well be a single price to all customers, regardless of their level in the distribution chain and the functions they perform. Price stabilization at the consumer level is the likely result, driven by the perverse logic that a supplier's pricing decisions should be keyed to its least efficient customer. Eventually, certain functions and services which the American consumer now takes for granted may be eliminated. This will disrupt, if not destroy, a time-tested distribution system based on the prompt delivery of millions of automotive products to consumers wherever and whenever needed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed, and that the legality of functional discount pricing—without the encumbrances imposed by that court—should be confirmed.

Respectfully submitted,

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Dated: August 3, 1989

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MOTION OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER TEXACO, INC.

Pursuant to Supreme Court Rule 36.3, the National Association of Convenience Stores (NACS) and the Society of Independent Gasoline Marketers of America (SIGMA) move for leave to file an *amici curiae* brief in support of petitioner Texaco, Inc. The consent of the parties to the filing of this brief has been sought. Respondents Ricky Hasbrouck *et al.* did not grant their consent.

This Court previously granted the motion of SIGMA and NACS for leave to file an *amici curiae* brief in support of Texaco, Inc.'s petition for a writ of certiorari. *Texaco, Inc. v. Hasbrouck*, 109 S.Ct. 46 (1988) (order granting motion to file brief as *amici curiae*).

SIGMA is a national trade association of 315 independent marketers of motor fuels. Last year, SIGMA members sold nearly 17 percent of the motor fuels sold in the United States. Seventy-nine percent of SIGMA's members are engaged in wholesaling, and 92 percent are engaged in retail marketing. SIGMA members own and operate approximately 11,000 branded and unbranded retail outlets. They also supply product to 13,700 retail outlets owned by others.

NACS is the national trade association of the convenience store industry. Its 1,338 members operate over 57,000 stores in all 50 states. Approximately 60 percent of NACS' members sell gasoline. Many NACS members are also engaged in wholesale operations.

If allowed to stand, the decision below would have a substantial adverse impact on the industries represented by SIGMA and NACS. The court of appeals held that a longstanding pricing practice, the granting of functional discounts to middlemen in the distribution chain, may give rise to liability under the Robinson-Patman Act if the discounts injure non-competing direct-purchasing retailers. As wholesalers, the members of SIGMA and NACS could not resell profitably to retailers if their suppliers charged them the same prices that they charged direct-buying retailers. Nor would SIGMA and NACS members have any incentive to perform distributive functions if they received discounts which precisely matched their costs, leaving no profit margin.

The decision below held that functional discounts granted to wholesalers may violate Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), if they are not cost-based and if a wholesaler passes on all or part of the discount to independently owned and operated retail outlets. As is fully set forth in Texaco's brief, this ruling has no support in prior decisions of this Court and conflicts with a substantial body of precedent holding that it is not unlawful for manufacturers to sell at lower prices to wholesalers than to non-competing retailers, provided the wholesalers make their own resale pricing decisions. To avoid liability under the standard developed by the court below, manufacturers would be required to administer cost-based discount systems, but that would be completely impractical. The decision below would discourage efficient marketing and would result in the elimination of the independent wholesaling segment of the motor fuels industry, which provides strong

price and service competition for the major oil companies.

SIGMA and NACS are more familiar than either party with some of the important practical issues raised by the decision below. SIGMA and NACS are better situated than the parties to explain why it is unreasonable to ask independent marketers to share detailed cost information with their suppliers, which are often also their competitors. SIGMA and NACS are also in a better position than the parties to explain the many factors that affect wholesalers' costs and to show why it would be impractical for refiner-suppliers to administer a cost-based discount system.

SIGMA and NACS believe that the decision below will result in the elimination of wholesaler discounts, which are critical to their members' ability to compete. With respect, the effect of the decision below on independent motor fuels marketers would be more immediately felt, and is better understood, by SIGMA and NACS than the parties.

The proposed brief of SIGMA and NACS is attached.

Respectfully submitted,

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Dated: August 3, 1989

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO, INC.,
Petitioner,

v.

RICKY HASBROUCK, d/b/a Rick's Texaco, *et al.*
Respondents.

BRIEF OF AMICI CURIAE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF PETITIONER TEXACO, INC.

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BRIEF OF AMICI CURIAE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF PETITIONER TEXACO, INC.

The Society of Independent Gasoline Marketers of America (SIGMA) and the National Association of Convenience Stores (NACS) respectfully submit this *amici curiae* brief in support of petitioner Texaco, Inc.

INTEREST OF AMICI CURIAE

The Society of Independent Gasoline Marketers of America is a national trade association representing independent marketers of motor fuels. SIGMA's 315 members sell refined petroleum products in all 50 states. In 1988 SIGMA members sold 22.7 billion gallons of fuel, which represented almost 17 percent of the motor fuel sold in the United States. SIGMA members directly own and operate 11,000 branded and unbranded retail outlets. In addition, three out of every four SIGMA members have wholesale operations. SIGMA members supply branded and unbranded petroleum products to 13,700 retail outlets owned by other companies.

The National Association of Convenience Stores is the national representative of the convenience store industry. The 1,338 members of NACS operate over 57,000 convenience stores, approximately 60 percent of which sell gasoline. Many NACS members are also engaged in gasoline wholesaling, supplying branded and unbranded retail outlets.

The members of NACS and SIGMA are independent marketers. Their primary sources of supply are the major oil companies and independent refiners, although they also purchase product from small refiners and jobbers, and on the spot market. Stringent cost control and innovative marketing techniques are hallmarks of the independent segment of the motor fuels industry. Superior efficiency enables SIGMA and NACS members to compete aggressively against the major oil companies; indeed, the independent marketing segment of the motor fuels industry is acknowledged to be "the most competitive factor in the industry at the wholesale and retail levels." *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 383 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

It is customary for the refiner-suppliers to grant graduated discounts—functional discounts—to their customers according to their level in the distribution chain, with the distributors at the level nearest the refiners paying the lowest price and retailers, who are the last link in the distribution chain before the consumer, paying the highest price. Independent distributors could not exist without functional discounts. In many markets the refiner-suppliers employ a dual distribution system, serving independent retail outlets directly and also selling to middlemen which in turn resell to independent retailers. If SIGMA and NACS members were charged the same price as direct-buying retailers, they could not profitably resell to retail outlets.

If allowed to stand, the decision below would have a substantial adverse impact on SIGMA and NACS members as well as on competition and consumers generally. The court of appeals held that Section 2(a)

of the Robinson-Patman Act, 15 U.S.C. § 13(a), may be violated where a manufacturer grants a discount to a distributor and (1) the discount exceeds the cost of the distribution functions it performs; and (2) all or a part of the discount is passed on to the distributor's customers. Under the standard announced by the court below, Texaco and other refiner-suppliers risk treble damages liability when they grant wholesaler discounts unless they match each wholesaler's discount to its costs. The court of appeals' rule is unsound as a matter of antitrust policy and business practicalities. The members of SIGMA and NACS should not be expected to reveal their distribution costs to their suppliers, which are often also their competitors, yet this would be required to ensure exact matching of costs and discounts. Moreover, if discounts were required to be no greater than the wholesaler's costs this would discourage firms from engaging in valuable wholesaling services. SIGMA and NACS members would have no incentive to incur the costs and risks associated with wholesaling, nor any incentive to achieve efficiencies in wholesaling, if they could not earn a profit on the services performed.

Because the cost-justified discount regime envisioned by the court below is completely impractical, refiner-suppliers would be left with two choices: either they must monitor and control distributors' resale prices to prevent them from passing on any part of their discount, or they must eliminate functional discounts and sell at one price to all levels of trade. The first option is obviously unacceptable, since it would expose suppliers and wholesalers to resale price maintenance claims under Section 1 of the Sherman Act. The second option, elimination of functional discounts,

would harm competition and consumers. It would force the members of SIGMA and NACS out of the wholesaling business, thereby depriving retail stations and consumers of a competitive alternative to the vertically integrated oil companies.

SUMMARY OF THE ARGUMENT

The court below held that a manufacturer may violate the Robinson-Patman Act if it charges higher prices to retailers than to non-competing wholesalers and the wholesalers pass on all or a portion of their discount to independent retailers. If allowed to stand, this decision will cause distributional inefficiency and discourage the formation and continuation of independent wholesaling businesses.

1. Texaco and other refiners of motor fuels make discounts available to wholesalers and jobbers as an incentive to perform distributional functions of value to them. Efficient wholesalers are able to keep their costs below the level of the wholesaler discount and thus earn a profit on the services they provide. The rule announced by the Ninth Circuit in this case, which requires strict equivalence between each wholesaler's costs and the size of the discount it receives, would remove the economic incentive to perform wholesaling functions and lead to greater vertical integration. The decision below, if allowed to stand, would reduce economic efficiency, eliminate a class of independent and innovative businesses, and deprive retail outlets and consumers of a competitive alternative to the major oil companies and refiners.

2. It is unrealistic and unwise as a matter of antitrust policy to expect independent marketers of motor fuels to disclose their cost data and pricing plans

to their suppliers, yet that is what would be required in order to ensure that wholesalers could not pass on any part of their discount to their customers. In many cases, independent wholesalers and jobbers are in direct competition with their suppliers. Moreover, it would be an enormous administrative burden for refiner-suppliers to match each wholesaler's discount to its costs, and this burden would discourage refiners from distributing their products through wholesalers, even though that may be the most efficient method. And, even if manufacturers were willing to administer a cost-based discount system, the resulting discrimination among competing wholesalers might violate Section 2(a).

3. It has been suggested that the decision below might stand for the proposition that the Robinson-Patman Act may be violated only where a manufacturer has actual knowledge that its wholesaler discounts are being passed through to retailers. *See* Brief for the United States as Amicus Curiae, *Texaco, Inc. v. Hasbrouck*, No. 87-2048 (U.S. May, 1989), at 12-13 (hereinafter "U.S. Br."). Addition of an "actual knowledge" element to the liability standard announced by the court below would not correct its defects; it would only cause an upsurge in price complaints and meritless Robinson-Patman claims.

ARGUMENT

I. THE DECISION BELOW WILL CAUSE DISTRIBUTIONAL INEFFICIENCIES, HARM SMALL COMPETITORS, AND DIMINISH CONSUMER WELFARE.

The motor fuels distribution system in this country is complex and constantly evolving. Historically, the distribution system could be viewed as a pyramid,

with a few dozen oil companies and independent refineries at the apex and many thousands of chain retailers and independent service station dealers at the base. Independent wholesalers and jobbers occupied intermediate levels in the pyramid. The oil companies and independent refiners have long relied on wholesalers and jobbers to distribute their products to retail outlets, especially those in rural areas and small towns.

The petroleum industry, like the rest of the economy, is not static. In many markets the major oil companies and refiners now market through two distribution channels; *i.e.*, they sell through company-owned retail stations and/or direct-supplied independent stations, as well as through independent branded wholesalers. That independent wholesalers continue to exist and, indeed, thrive in competition with their suppliers is attributable to their ability to operate more efficiently and with lower overhead costs than the refiner-suppliers. But no matter how efficient they are, independent wholesalers cannot operate at a profit unless they can buy product at lower prices than direct-buying retail outlets.

The decision below would require manufacturers which grant wholesaler discounts either to match them precisely to the wholesalers' costs or control the wholesalers' resale prices. This rule rests on the mistaken premise that the sole purpose of wholesaler discounts is to offset the costs incurred by wholesalers in performing functions which are not performed by direct-purchasing retailers. Such functions include bulk storage, transport and delivery of product, extension of credit to retailers, and provision of promotional assistance to retailers. Wholesaler discounts must do

more than cover the costs of performing these functions; they must also provide the economic incentive for businesses to perform distributive services. No rational business would make the capital investments and take on the burdens and risks of wholesaling unless it had a reasonable likelihood of earning a profit on the services performed. Moreover, businesses presently engaged in wholesaling would have no incentive to be efficient if they knew they could not earn a profit on the distributive services, or if they knew that they would not be allowed to pass on any of their discount in order to increase market share.[1]

The oil companies and independent refiners distribute their products through middlemen because they have determined that this is more cost-effective than complete vertical integration. Independent wholesalers continue to exist and thrive in areas where their suppliers also sell directly to retail outlets because of their superior efficiency. The decision below will encourage manufacturers to become totally vertically integrated, if they are able, and will discourage cost cutting by wholesalers; thus, it clearly will cause distribution to be less efficient.

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[1] The lower court's cost/discount equivalence rule would have the perverse effect of rewarding the least efficient wholesalers with the largest discounts. In rejecting a rule that would have based the size of permissible wholesaler discounts on the wholesaler's costs, the Federal Trade Commission pointed out that "[e]ven if the discounts accurately reflected each customer's costs, under any variable discount system the less efficient firms with higher costs would receive higher discounts—an economically unfortunate reversal of desired incentives." Boise Cascade Corp., 107 F.T.C. 76, 212 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988).

By removing all profit from wholesaling and encouraging refiners to integrate vertically, the decision below would harm independent wholesalers and jobbers. This outcome would be ironic, given that the purpose of the Robinson-Patman Act was to preserve independent wholesalers and retailers. *See generally* F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 11-23 (1962). The decision below would also harm independent retail stations and consumers. Independent retail stations look to wholesalers and jobbers as a competitive alternative to the large oil companies. Independent marketers provide strong price competition in areas where the refiner-suppliers employ dual channel marketing systems.[2] The elimination of independent wholesalers, which is inevitable if they are unable to resell at a profit after performing their distributive functions, would mean fewer choices and higher prices for retailers and consumers.

This Court has stressed the necessity of avoiding, whenever possible, constructions of the Robinson-Patman Act which conflict with the consumer welfare orientation of the other antitrust laws. *See Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 (1979); *United States v. United States Gypsum Corp.*, 438 U.S. 422, 458 (1978). Nothing in the text or legislative history of the Robinson-Patman Act supports, much less compels, the construction adopted by the court below. The Ninth Circuit's liability standard would thwart efficient distribution and reduce competition. It should, therefore, be rejected.

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[2] *See generally Report of the Federal Trade Commission on Mergers in the Petroleum Industry* 287-90 (1982).

II. THE NINTH CIRCUIT'S REQUIREMENT THAT WHOLESALER DISCOUNTS BE COST-BASED IS IMPRACTICAL AND WOULD REQUIRE MANUFACTURERS TO DISCRIMINATE AMONG WHOLESALERS.

Under the decision below, manufacturers who grant functional discounts can be safe from Robinson-Patman Act liability only if they either tailor each wholesaler's discount to its costs or control the wholesalers' resale prices so as to prevent them from passing on any part of the discount.

It is utterly unrealistic to expect motor fuel refiners to administer a pricing scheme in which costs and discounts are always matched. Refiner-suppliers cannot know each customer's costs of wholesaling, nor would they normally know whether their customers plan to pass on part of their discount to their own customers. Independent motor fuels marketers are in competition with the refiner-suppliers.[3] The cost advantage SIGMA and NACS members enjoy over the refiner-suppliers, which is attributable to their efficiency, is absolutely critical to their survival. It would be economic suicide for the members of SIGMA and NACS to divulge, on an ongoing basis, their most sensitive financial information to their suppliers, or to share their pricing plans with them.

Even if independent wholesalers were inclined to cooperate with suppliers' efforts to monitor their costs, a cost-based discount system would be unworkable. The costs of wholesaling vary from com-

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[3] Approximately 60 percent of the members of NACS sell gasoline at retail, and 92 percent of SIGMA members have retail operations. NACS and SIGMA members own and operate both branded and unbranded retail outlets.

pany to company and are influenced by a host of factors which are within each wholesaler's discretion as an independent business. For example, a fuel wholesaler which distributes products from its own bulk terminal has different costs than one which leases a terminal; a wholesaler which transports products in its own trucks has different costs than one which uses common carriers; and a wholesaler which maintains a large, trained staff has different costs than one which does not. Other factors affecting an individual wholesaler's costs include the length of time it stores the refiner's product prior to resale; how much and what grades of product are maintained in the wholesaler's inventory; and whether and to whom the wholesaler extends credit. Some wholesalers provide marketing assistance to their customers; others do not. Finally, at any given time a wholesaler may be selling fuel that originated with more than one supplier, which would require its costs to be apportioned somehow among the various suppliers. In short, it would be enormously burdensome for refiner-suppliers to manage a cost-based discount regime. Of course, the administrative costs would ultimately be borne by the consumer.

If a manufacturer were to attempt to administer a variable discount system, it could be exposed to Robinson-Patman claims for discriminating in price among competing wholesalers. As the Federal Trade Commission has pointed out, "[a] manufacturer almost certainly could not know in detail each customer's costs to perform certain functions. Granting the different discounts based on guesses about individual customer costs could easily lead to discriminatory prices." *Boise Cascade Corp.*, 107 F.T.C. 76, 212

(1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). The statutory cost justification probably would not be available in this situation; the defense absolves price variances based on differences in the manufacturer's costs of selling to different customers, not differences in the customers' distribution costs. *See Boise Cascade Corp.*, 107 F.T.C. at 212.

Faced with the administrative burdens and legal risks associated with a system of cost-based discounts, refiner-suppliers most likely will vertically integrate (if they can) or charge the same price to all customers no matter what their level of trade. The only other way for refiner-suppliers to avoid Robinson-Patman liability would be to monitor and control their wholesalers' resale prices to ensure that no part of the discount is being passed on, but this would run afoul of the *per se* ban against resale price maintenance. *See, e.g., Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 37-41 (5th Cir.) (resale price maintenance agreement established by denial of competitive allowance in retaliation for customer's failure to adhere to suggested resale prices), *cert. denied*, 409 U.S. 1077 (1972). It would be hard to blame refiners for deciding to eliminate wholesaler discounts or vertically integrate rather than navigate the legal minefield sown by the decision below.

III. THE DECISION BELOW CANNOT BE CORRECTED BY ADDING AN "ACTUAL KNOWLEDGE" ELEMENT.

In an *amicus curiae* brief, the United States suggests that the Ninth Circuit's decision might be read to contain a requirement that the manufacturer had "actual knowledge" that a middleman had passed on part of its discount before it could be held liable. U.S. Br. 12-13. The Ninth Circuit's explicit holding con-

tained no such limitation, but if the court of appeals had included an "actual knowledge" element in its liability standard, that standard would still be erroneous.

The United States suggests that the decision below may have established the "rule that a supplier must mitigate the known downstream effects of a passed-through wholesaler discount." U.S. Br. 14. This formulation glosses over the question whether it is appropriate to place liability on the manufacturer where (1) it has not discriminated between competing customers; and (2) any injury to direct-buying retailers is attributable to the independent pricing decisions of wholesalers. Until the decision below, that question could be confidently answered in the negative, for the courts have recognized that "[i]f the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition." *Purolator Products, Inc. v. FTC*, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968). Only where a manufacturer uses a "dummy" wholesaler to funnel discriminatory prices to retailers have manufacturers been held liable for injuries suffered by disfavored direct-buying retailers. *See, e.g.*, *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 83-84 (6th Cir. 1981). Thus, liability has always turned on whether the manufacturer exercised control over the transaction between the wholesaler and the retailer, not on its "knowledge" of the wholesaler's pricing practices.

In any event, an actual knowledge gloss would not cure the defects of the decision below. The United States acknowledges that it would be undesirable and

inefficient to put manufacturers in a position where they must either eliminate functional discounts or "tailor the discount precisely to the costs and pricing strategies of each individual wholesaler." U.S. Br. 9-10. And, of course, the United States would not condone resale price maintenance as a means of preventing the pass-through of functional discounts. But what other ways are there for a manufacturer to "mitigate" the effects of a passed-through wholesaler discount once the pass-through comes to its attention?

As this Court has pointed out, "complaints about price cutters 'are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the actions of their rivals.'" *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984). If a manufacturer's "actual knowledge" that functional discounts are being passed through were to be made the touchstone for Robinson-Patman liability, formerly routine price complaints would suddenly become critical events, requiring immediate investigation and action against any wholesalers found to be pricing "too low."

In sum, under both a literal reading of the decision below and the United States' proposed reading, manufacturers would risk treble damages liability for failing to take action against wholesalers whose efficiencies upset direct-buying retailers' notions of what constitutes a "fair" retail price. Under both the Ninth Circuit's stated approach and the United States' proposed approach, a manufacturer must either raise the price to the offending wholesalers, extract an agreement that they will raise their resale prices, or terminate them. None of these outcomes would serve antitrust policy or consumers.

CONCLUSION

For all the reasons set forth above, SIGMA and NACS agree with petitioner Texaco, Inc. that the standard of Robinson-Patman liability adopted by the court of appeals was erroneous. This Court should reject the Ninth Circuit's rule and endorse the position of the Federal Trade Commission and several other courts of appeal, which have held that manufacturers do not violate the Robinson-Patman Act when their price to retailers is higher than their price to non-competing, *bona fide* wholesalers.

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Dated: August 3, 1989

MOTION FILED
AUG 3 1989

No. 87-2048

IN THE

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OCTOBER TERM, 1989

TEXACO INC.,

Appellant,

v.

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Appellees.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

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August 3, 1989

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IN THE

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Appellees

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Texaco Wholesalers hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused

The interest of the National Association of Texaco Wholesalers arises because its members will be directly and negatively affected should the ruling of the Court of Appeals for the Ninth Circuit stand. The Association is better able to argue the effect of this case on its members and the central importance of

functional discounts to wholesalers of refined petroleum products, particularly motor fuel, than either of the parties would be.

Respectfully submitted,

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August 3, 1989

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Respondents.

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

INTEREST OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

The National Association of Texaco Wholesalers is an independent trade association composed of 1,300 wholesalers of "TEXACO" petroleum products. These wholesalers supply approximately 15,000 retail outlets, and collectively sell over half the gasoline and over 70 percent of the "middle distillates" refined by Texaco and sold in the United States.

This brief is submitted in support of the appellant. The text of the brief *Amicus Curiae* hitherto submitted with respect to the Petition for a Writ of Certiorari is incorporated by reference herein.

As detailed below, the Ninth Circuit's decision in this case threatens to destroy the entire wholesale sector of petroleum marketing, including the businesses of every member of the Association. Accordingly, the members have a vital interest in the outcome of the action.

ARGUMENT

Wholesalers exit- and justify that existence in economic terms- only by the services or functions they provide.

If independent wholesalers of refined petroleum products- particularly motor fuel marketed under the brand name of a major refiner, and the retailers they serve, are to continue as a viable sector of the economy; it is essential that the granting of functional discounts be continued. Only if wholesalers are compensated for the cost saved their suppliers by the wholesaler performed functions, can the wholesalers continue to supply these services.

These functional discounts permit the more efficient serving of the consumer by small businesses, as compared to direct distribution by the refiners themselves. Local needs are met more promptly and economically by local wholesalers than by centralized refiner delivery. This is particularly true in the case of motor fuel. Retail outlets can, and do, exhaust their supplies contained in the underground tanks in a very brief, and unpredictable, time span. Thus, motorists' needs- as well- are more efficiently served by prompter localized supply. During periods of supply disruption, local supply has proven it can best cope with the myriad needs of the local market. The secondary

storage provided by wholesalers is a vital link in the supply chain, even in the context of national defense.

To be valid, functional discounts must reflect real functional differences. See: *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952). Further, for such discounts to be administratively practicable, they must be based on the factor common to all recipients of the discount: the savings to the grantor of the discount, arising from the fact that it is relieved from the burdens of those functions which it would necessarily have performed, had the wholesaler not performed them instead.

To the extent that a cost justification rationale is the underlayment of functional discounts, it is submitted that *only* discounts based on the savings to the supplier-grantor could validly fill this role. The cost to the recipient (of the functional discount) of performing the requisite functions is irrelevant. The incalculable burden of computing and administering a "buyer's cost" discount would dictate prompt adoption of a one price system, a death knell for wholesalers. The potential for anticompetitive effects from an overly rigid application of the Robinson-Patman Act foreseen by *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 440 U.S. 69,80 (1979) would proliferate.

Nor could there be any adverse effect upon competition if the discount granted is equal to the cost from which the grantor is relieved. This is so, because the refiner would be subject to the same costs whether supplying retailers, not performing the wholesale functions and not receiving the discount, or wholesalers who both performed the function and received the discount. See: *Doubleday & Co.*, 52 F.T.C. 169, 207-208 (1955).

In light of the fact that plaintiffs, themselves, advised the jury that no wholesaler operated stations were owned by Dompier until 30 months of the damage period had elapsed (Tr.3183); dual distribution by the recipient of functional discounts is not an issue presented by this case.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed and remanded. This Court should enunciate with final clarity the rule that functional discounts to wholesalers can not result in price discriminations, if the discount is based upon and equal to the cost from which the grantor is relieved by the performance of valid functions by the wholesaler receiving the functional discount.

Dated: August 3, 1989

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CERTIFICATE OF SERVICE

I, Gregg R. Potvin, a member of the Bar of this Court, hereby certify that on this 3rd day of August, 1989, three copies of the Motion for Leave to File a Brief Amicus Curiae in the above titled case were mailed, first class postage prepaid, to counsel for petitioners, and to counsel for respondents, as listed below. I further certify that all parties required to be served have been served.

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No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO, INC.,

Petitioner,

vs.

RICKY HASBROUCK, d/b/a
RICK'S TEXACO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF BOISE CASCADE CORPORATION

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MOTION OF BOISE CASCADE CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Boise Cascade Corporation ("Boise Cascade") respectfully moves, pursuant to Rule 36.3 of the Rules of this Court, for leave to file the attached brief as amicus curiae. The brief is in support of petitioner, Texaco, Inc., to the extent petitioner contends that the *Morton Salt* inference of competitive injury is inapplicable to functional discounts. The consent of counsel for the petitioner has been obtained. The consent of counsel for the respondents was requested but refused.

Boise Cascade is interested in this appeal because: (1) Boise Cascade is the respondent in a Robinson-Patman action pending before the Federal Trade Commission ("FTC"), *Boise Cascade Corp.*, 107 F.T.C. 76 (1986), *rev'd and remanded*, *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988), that involves issues similar to those presented in this appeal, and (2) as a dual distributor (*i.e.*, a reseller to dealers and end

users) of office products and a manufacturer of forest products that it sells to wholesalers, dual distributors and retailers, Boise Cascade receives and offers functional discounts, the lawfulness of which are placed in question by the decision of the Ninth Circuit.

This Court's analysis of the Robinson-Patman Act's competitive injury requirement could have a significant impact on the ultimate resolution of the *Boise Cascade* matter. Moreover, this appeal has serious implications for distribution systems that are employed in numerous industries throughout the United States, including those in which Boise Cascade participates as a manufacturer or distributor. For these reasons, Boise Cascade seeks to appear as amicus curiae to present its views on one important issue posed in this appeal — the applicability of the *Morton Salt*[1] inference of competitive injury to functional discount pricing practices.

In their briefs on the petition for certiorari, Texaco and the respondents, as well as the United States and other amici, discussed the FTC decision in *Boise Cascade* and the decision of the District of Columbia Court of Appeals reversing and remanding that decision. As a litigant in those continuing proceedings for over thirteen years, Boise Cascade respectfully suggests that the Court may benefit from its views on the decisions in *Boise Cascade* and their relationship to Texaco's appeal.

In the *Boise Cascade* matter, the FTC challenged Boise Cascade's receipt of a wholesale functional discount under Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f).[2] The FTC found that Boise Cascade violated the Act by accepting

[1] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

[2] Section 2(f) makes it unlawful "for any person . . . knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f).

functional discounts on goods resold to end users, even though such discounts were offered by office products manufacturers on the basis of objective standards to all wholesalers and dual distributors. In so finding, the Commission inferred a lessening of competition from the mere existence of the functional discounts, ignoring specific evidence of the absence of competitive injury. The District of Columbia Circuit granted Boise Cascade's petition for review and remanded the case to the FTC for assessment of the specific evidence bearing on the issue of competitive injury. *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127, 1148 (D.C. Cir. 1988). The case was reargued before the FTC on July 28, 1988, and is awaiting decision. This Court's determination of the proper application of the Robinson-Patman Act's competitive injury requirement to functional discounts could have a material effect on the resolution of *Boise Cascade*.

Aside from the FTC litigation, Boise Cascade is interested in this appeal because of its role as a dual distributor of office products and as a seller of forest products to wholesalers, dual distributors and retailers. Functional discounts and dual distribution are both longstanding and prevalent practices throughout the United States economy. In the office products industry, manufacturers have employed functional discounts for over 40 years. Such discounts are offered to induce distributors to undertake distribution and marketing functions required for efficient distribution of manufacturers' products. The record in *Boise Cascade* demonstrates that manufacturers in the office products industry, like Texaco in this case, extend functional discounts to all companies, regardless of size, that meet the manufacturers' objective criteria.

The approach of the Ninth Circuit in this case casts substantial doubt on the lawfulness of functional discounts in all industries and may, as a practical matter, preclude their use in most situations. Thus, the implications of the present case

are not limited to Texaco's pricing practices in Spokane, Washington, but potentially affect distribution systems utilized throughout the Nation's economy. Because Boise Cascade has carefully analyzed the competitive effects of functional discounts in the office products industry in the course of the FTC litigation and because Boise Cascade can capably represent the interests of manufacturers, wholesalers and dual distributors who grant or receive similar discounts, it is uniquely qualified to comment on the proper application of the Robinson-Patman Act to this pricing practice from the perspective of manufacturers and distributors alike.

Accordingly, Boise Cascade respectfully requests that leave be granted for the filing of its attached brief amicus curiae.

Respectfully submitted,

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August 3, 1989

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BRIEF AMICUS CURIAE OF BOISE CASCADE CORPORATION

Boise Cascade Corporation ("Boise Cascade") respectfully submits this brief as amicus curiae pursuant to Supreme Court Rule 36.2. Boise Cascade's brief is limited to the second "question presented" by the Petitioner Texaco.[1] To the extent petitioner contends that the *Morton Salt* inference of competitive injury is inapplicable to functional discounts, Boise Cascade's brief is in support of the petitioner.

[1] The second "question presented" in Texaco's petition is as follows:

> Whether the *Morton Salt* "self-evident" inference of injury to competition from sales over time to competing customers at different prices (334 U.S. at 50) has any application to the age-old practice of selling to wholesalers at lower prices than to retailers?

(Pet. App. at i)

INTEREST OF AMICUS CURIAE

As described more fully in the attached motion, Boise Cascade is interested in the outcome of this appeal because it functions as a dual distributor (*i.e.*, a reseller to dealers and end users) of office products and is the respondent in a case currently pending before the Federal Trade Commission ("FTC") involving issues similar to those presented here. *See In re Boise Cascade Corp.*, No.9133. The FTC matter is on remand from the Court of Appeals for the District of Columbia Circuit for reconsideration of the proper application of the competitive injury requirement of the Robinson-Patman Act to functional discounts in a dual distribution setting. *See Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988). In addition, as an integrated forest products company, Boise Cascade distributes many of its products through wholesalers, dual distributors and retailers. Boise Cascade is representative of the many business enterprises that distribute their products, and those of other manufacturers, through complex, multi-tiered distribution systems. In such systems, manufacturers provide price differentials that recognize differing functions performed by distributors operating at various levels of distribution. Such pricing practices are prevalent throughout the Nation's economy, and proper application of the Robinson-Patman Act to these practices is important to the development and preservation of efficient distribution systems.

The second "question presented" to this Court by the Petitioner Texaco concerns the applicability of the *Morton Salt*[2] inference of competitive injury to functional discounts. Resolution of this issue will have a considerable impact on the distribution structure of American industry. If functional discounts are presumed to injure competition as found by the

[2] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

Ninth Circuit, many suppliers would be compelled to discontinue those discounts, and many dual distributors would be forced to withdraw from one level of distribution. The result would be a restructuring of distribution systems and a reduction in competition inconsistent with the purposes of the Robinson-Patman Act and the other antitrust laws. *See Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979); *White Industries, Inc.* v. *Cessna Aircraft Co.*, 845 F.2d 1497, 150[illegible] (8th Cir.), *cert. denied*, ___ U.S. ___, 109 S. Ct. 146 (1988). Thus, it is critical that this Court clarify the proper application of the competitive injury requirement of the Robinson-Patman Act to functional discount pricing systems.

SUMMARY OF THE CASE

In the proceedings below, Texaco was found liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), for making sales of gasoline to independent wholesalers at lower prices than it charged to plaintiffs who operated retail service stations. The plaintiffs contended that they suffered competitive injury as a result of the price differential, despite the fact that the allegedly favored wholesalers operated at a different distributional level. The Ninth Circuit agreed, holding that competitive injury could be inferred from the existence of the price difference. *Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1988). The court concluded that such an adverse competitive effect was "obvious and foreseeable," even though the plaintiff-retailers and the wholesalers performed different marketing functions. *Id.* at 1040. Thus, the court below concluded that once a significant price differential between distributors is established, competitive injury is assumed, and it is the seller's duty to justify its pricing policy under the Act. *Id.* at 1041.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision below represents an unprecedented extension of the *Morton Salt* inference of competitive injury to price differentials arising from functional discounts.[3] This extension of the inference is fraught with anticompetitive potential. Boise Cascade respectfully submits that there is a strong basis in the legislative history of the Act, this Court's prior decisions and sound economics, to hold the *Morton Salt* inference inapplicable to functional discounts.

The legislative history of the Act makes clear that Congress was primarily concerned with the competitive threat posed by quantity discounts extracted by large buyers, not functional discounts accorded even-handedly to wholesalers and dual distributors as compensation for the distribution functions they perform. Consistent with this legislative concern, the Court found in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), that injury to competition was "self-evident" in a scheme of volume discounts that provided dramatically lower prices to the seller's five largest customers. In *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the Court applied a similar inference to arbitrary price discriminations based on the location of the purchaser. These arbitrary and economically unjustified pricing practices were of the type that animated Congress in its passage of the Act. Moreover, it was plausible to infer that these discriminatory practices had anticompetitive potential, particularly in light of the actual evidence of competitive injury in both cases.

[3] As used in this brief, the term "functional discounts" refers to discounts provided by sellers to compensate distributors for activities performed and costs incurred in connection with the distribution or marketing of sellers' products.

By contrast, functional discounts logically distinguish between distributors that perform different distribution and marketing activities. When such discounts are even-handedly employed in a competitive market, the discounts are procompetitive because they foster the development of efficient distribution systems. Thus, this Court's prior decisions do not support application of the inference of competitive injury to functional discounts offered to wholesalers and dual distributors. Extension of the inference of competitive injury created by the Court in *Morton Salt* to a practice quite different from that which gave rise to the inference is both unwarranted and capable of perverse competitive consequences. Such a holding would inhibit a manufacturer's ability to transfer distribution functions to those who can perform them most efficiently.

Nevertheless, if the inference of competitive injury were to be extended to functional discounts, Boise Cascade submits that the inference should be applied with the care dictated by the District of Columbia Circuit's decision in *Boise Cascade*. Such an approach requires an assessment of the purposes of the discount and its potential and actual competitive effects in a particular factual setting. Application of the Act in this manner would minimize the potential for unwarranted disruption of efficient distribution systems caused by overbroad application of the inference.

ARGUMENT

I. THE *MORTON SALT* INFERENCE OF COMPETITIVE INJURY SHOULD NOT BE EXTENDED TO FUNCTIONAL DISCOUNT PRICING SYSTEMS.

The Ninth Circuit held that injury to competition may be inferred from the fact that Texaco charged lower prices to wholesalers than to direct-buying retailers. Neither the legislative history of the Robinson-Patman Act nor prior

decisions of this Court support such an unprecedented extension of the inference of competitive injury created in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

As this Court has stated, the Robinson-Patman Act "was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 75-76 (1979). The legislative history makes clear that Congress sought to prohibit the favoritism toward large buyers that had arisen from the original Clayton Act's allowance of *quantity discounts*. *See Morton Salt*, 334 U.S. at 43-44. The Act "in short, sought to remove the competitive advantage conferred solely by virtue of the size of the buyer's appetite." *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127, 1138 (D.C. Cir. 1988).

It was in this paradigm Robinson-Patman Act setting that the Court decided *Morton Salt*. At issue there was a salt manufacturer's *volume discount* pricing system structured so that only five large retail chains qualified for the best discount. The larger discount enabled these favored purchasers to reduce their *resale* prices below the level at which their smaller retail competitors could buy the product. *Morton Salt*, 334 U.S. at 41. The Court observed that the volume discount in *Morton Salt* was precisely the type of pricing practice Congress intended to address through the Robinson-Patman Act. *Id.* at 43-44. In that context, the Court found it "self-evident" "that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Id.* at 50. In reaching that conclusion, the Court also relied on the substantial record evidence of widespread economic losses resulting in diminished competition:

> It [the FTC] heard testimony from many witnesses in various parts of the country to show that *they had suffered actual financial losses on account of respondent's discriminatory prices*. Experts were offered to prove the tendency of injury from such prices. *The evidence covers about two thousand pages*, largely devoted to this single issue — injury to competition.

Id. (emphasis added). What the Court found "self-evident" in *Morton Salt* was informed by substantial practical experience with the volume pricing practice at issue and by direct evidence of competitive injury.

Unlike the volume discounts in *Morton Salt*, functional discounts were not perceived by Congress as a tool used by power buyers to destroy competition. Such discounts are offered by manufacturers to compensate distributors for the activities they undertake in the distribution or marketing of products that would otherwise be performed by the manufacturer. Through functional discounts, manufacturers achieve efficiencies by shifting distributive functions to those who can most effectively perform them. The legislative history of the Act reveals that Congress was well aware of the long-established use of functional discounts. *See* IV E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 2966-67, 3206, 3216 (1978) ("Kintner"). Indeed, the chief sponsor of the Act specifically stated with respect to the grant of functional discounts to dual distributors:

> There is nothing in the Act that prohibits a seller from giving a wholesaler-retailer the wholesale functional discount *on all his purchases, both those he purchases for resale to others and those he buys for retailing* through his own retail outlet. This is true as long as he performs the wholesale function on all his purchases.

W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (emphasis added).[4] Thus, as the District of Columbia Circuit noted in *Boise Cascade*, a functional discount accorded to all wholesalers and dual distributors that qualify on the basis of objective standards "is scarcely a paradigmatic Robinson-Patman Act case." *Boise Cascade*, 837 F.2d at 1139 n.14.

Prior to the Ninth Circuit's decision in *Hasbrouck*, no court had condemned functional discounts absent direct evidence establishing their anticompetitive potential or evidence that their use was a subterfuge to avoid the Act. The court below cited *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), in support of its application of the inference of injury, *see Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1988), but *Falls City* involved an arbitrary geographic price differential to competing distributors unrelated to the functions they performed. That arbitrary price differential was facilitated by state alcohol control laws and was accompanied by substantial "direct evidence of diverted sales" that were clearly attributable to the price differential. *Falls City*, 460 U.S. at 437. The evidence showed that numerous Indiana residents drove several miles into Kentucky to make "substantial purchases of beer" in violation of Indiana law because of the lower prices Kentucky distributors could offer as a result of the price discrimination. *Id.* at 433, 437 n.8. Thus, the Court found that in the absence of rebuttal evidence, competitive injury could be inferred.

Because *Falls City* involved the sort of arbitrary, non-economically justified price discrimination that concerned

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[4] Mr. Teegarden, chief draftsman of the Act, stated during the legislative debates that "so far as he [the integrated wholesaler or dual distributor] does effect an economy there is nothing in this bill to prevent that economy from being translated to the consumer." Kintner, at 2966.

Congress, and because of the existence of substantial evidence of the actual competitive effects of the price differential, that case falls neatly beside *Morton Salt* in Robinson-Patman jurisprudence. It does not follow, however, that *Falls City* supports a mechanical application of the inference of injury to price differentials arising from functional discount pricing systems that rationally distinguish between different activities performed by wholesalers and dual distributors on the one hand and retailers on the other. As the District of Columbia Circuit in *Boise Cascade* correctly concluded, cases involving functional discounts simply are "not of the lineage of *Morton Salt*." *Boise Cascade*, 837 F.2d at 1139 n.14. Thus, contrary to the opinion of the court below, *Falls City* does not require, or even support, application of *Morton Salt's* "self-evident" inference in the circumstances of this case. *See Boise Cascade*, 837 F.2d at 1151-52 (Williams, J., concurring).

It is also important to note that the *Morton Salt* inference of competitive injury is not derived from any language in the statute. Indeed, the Act requires a showing that the price discrimination may substantially lessen competition. The inference was created by the Court in a context where the existence of competitive injury was a compelling conclusion. However, it is illogical to extend this judicially-created device to factual settings where competitive injury is neither apparent nor the most plausible result of a price differential. This Court has cautioned against such overly broad applications of the Robinson-Patman Act that can result in price uniformity and rigidity that is antithetical to the antitrust laws. *See Great Atlantic & Pacific Tea Co.*, 440 U.S. at 80; *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953). In this case, the Ninth Circuit fell into the same error as the FTC in *Boise Cascade*. In *Boise Cascade*, the Court of Appeals chided the FTC for "entirely fail[ing] to inform its application of *Morton Salt's* inference of injury with the purposes of the Robinson-Patman Act." *Boise Cascade*, 837 F.2d at 1146.

In the Ninth Circuit's view, the inference is appropriate in highly competitive markets that are "strongly price sensitive." *Hasbrouck*, 842 F.2d at 1041. In such markets, an unjustified *volume* discount accorded to one competitor may well permit that competitor to achieve an economic advantage that will translate into competitive injury. However, it is precisely in such competitive circumstances that it may be necessary for manufacturers to offer *functional* discounts in order to induce wholesalers and dual distributors to undertake additional distributional and marketing functions. The performance of these functions requires distributors to incur additional costs that will further constrict already narrow profit margins. *See Boise Cascade*, 837 F.2d at 1152 & n.7 (Williams, J., concurring). In such circumstances, injury to competition is far from "self-evident." To the contrary, an inference of the absence of competitive injury is more plausible. Certainly, manufacturers in a competitive market will not voluntarily offer an additional discount if they do not believe that the wholesalers and dual distributors receiving it perform a valuable function in the distribution process. "[F]irms do not gratuitously turn profit opportunities over to other firms for no reason." *Id.* at 1151 (Williams, J., concurring).[5]

For these sound economic reasons, Robinson-Patman scholars have been highly critical of the unthinking

[5] The United States, in its brief on certiorari in this case, offered a similar analysis:

> In addition, market forces should tend to discourage a supplier from offering independent wholesalers discounts that would allow them to undercut the supplier's own retailer customers. A supplier would not normally find it profitable to offer independent wholesalers a discount in excess of the supplier's cost of providing the distribution services itself.

(U.S. Brief at 15)

application of the *Morton Salt* inference to pricing practices unlike those at issue in *Morton Salt*. Frederick Rowe, the preeminent Robinson-Patman scholar, has sharply criticized "talismanic incantations" of *Morton Salt* that "can foster economic discriminations and impede normal competitive price movements." Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law — A Paradox of Antitrust Policy*, 64 Colum. L. Rev. 415, 420-21 (1964). Rowe observes that the *Morton Salt* decision "ordained no blanket or conclusive presumption as to competitive injury" and concludes that the decision in that case was directly responsive to the factual circumstances:

> inasmuch as no countervailing considerations were pressed to mitigate the competitive impact of the challenged differential, the *Morton Salt* opinion's formulation was directly responsive to the issues and contentions in the case.

F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 182 (1962) (footnote omitted). Commentaries on the Act by other leading antitrust scholars support Rowe's conclusion that *Morton Salt* should be limited to similar factual circumstances. R. Posner, *The Robinson-Patman Act* 38-40 (1976) (Price differences that reflect the operation of a competitive market "should surely be permitted and indeed encouraged," and by confining application of *Morton Salt*, the Act can be limited to "practices that there is at least some economic basis for condemning."); R. Bork, *The Antitrust Paradox* 388 (1978) ("Substantial and sustained" price differences in competitive markets "necessarily reflect differences in the cost of doing business with different customers. Such differences arise from a variety of factors, including . . . . the performance of distributive functions by the customer . . . . ").

This Court recently observed in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986), that inappropriate use of inferences in antitrust cases can have serious anticompetitive consequences:

> [M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."

(citations omitted). Thus, by necessity, antitrust law "limits the range of permissible inferences from ambiguous evidence." *Id.* at 588; *see also Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515, 1520 (1988). These admonitions are particularly applicable in Robinson-Patman cases in light of the Court's directive that the Act not be applied in a manner "in open conflict with the purposes of other antitrust legislation." *Automatic Canteen*, 346 U.S. at 63. [6]

Mechanical application of the *Morton Salt* inference, typified by the Ninth Circuit's decision in this case, would effectively render many price differences *per se* illegal. Under such an approach, a plaintiff "need only show that a substantial price discrimination existed as between himself and his competitors over a period of time." *See Hasbrouck*, 842

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[6] The District of Columbia Circuit in *Boise Cascade* similarly stated that

> Robinson-Patman is not to be viewed as an act of Congressional schizophrenia, an anti-competitive island situated in an otherwise turbulent sea of pro-competitive efficiency and maximization of consumer welfare, the hallmark of the Nation's antitrust laws.

Boise Cascade, 837 F.2d at 1138.

F.2d at 1041. As the FTC acknowledged in *Boise Cascade*, "it may be difficult in most common commercial settings for a favored dual distributor to rebut the inference of injury." *Boise Cascade*, 107 F.T.C. at 211. This is especially so because under the Act it would be the seller's burden to prove the *absence of possible* competitive injury — a virtually impossible burden in many situations.[7]

Functional discounts distinguish logically between distributors based upon the different functions and activities they perform. It is often essential for a manufacturer to provide such discounts to induce distributors to incur the costs and risks of undertaking additional functions. As in the *Boise Cascade* situation, such functions may be performed by distributors who function at more than one distribution level. Nevertheless, where such dual distributors perform functions that a manufacturer deems valuable, injury to competition is hardly a compelling inference. To apply an automatic inference of injury in such a complex, multi-tiered distribution system would effectively preclude the courts from "distinguish[ing] between price differences which cause anticompetitive effects and those which reflect a 'desirable response to competition and considerations of efficiency.'" *Chrysler Credit Corp.* v. *J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). Such a rule would discourage manufacturers from transferring distributional and marketing functions to the distributors that can perform those functions most efficiently. As a result, the development

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[7] The practical significance of this burden is demonstrated by the position of FTC's complaint counsel even *after* the remand by the District of Columbia Circuit. Complaint counsel contends that evidence "tending to show the absence of an actual injury . . . would give rise, at best, to a bantamweight inference that must do battle against the heavyweight *Morton Salt* inference." (Complaint Counsel's Answering Brief at 7[illegible], *In re Boise Cascade Corp.*, FTC Dkt. No. 9133).

of more efficient modes of distribution would be retarded, and consumer welfare would be injured — a perverse application of the antitrust laws indeed.

II. IF THE *MORTON SALT* INFERENCE IS EXTENDED TO FUNCTIONAL DISCOUNTS, IT SHOULD BE APPLIED IN A MANNER CONSISTENT WITH THE PURPOSES OF THE ROBINSON-PATMAN ACT AND THE OTHER ANTITRUST LAWS.

If this Court were to determine that the *Morton Salt* inference should nevertheless be extended to functional discounts, Boise Cascade respectfully submits that the Court should adopt the analysis set forth by the District of Columbia Circuit in *Boise Cascade*. In *Boise Cascade*, the court held that the inference may be rebutted by evidence that competitive injury was unlikely as demonstrated, *inter alia*, by the continued competitive and economic success of the allegedly disfavored purchasers. *Boise Cascade*, 837 F.2d at 1144-47.

In analyzing the longstanding, even-handedly applied system of functional discounts employed in the office products industry, the Court of Appeals in *Boise Cascade* held that application of the *Morton Salt* inference "does not justify abdication of the duty to consider evidence indicating that a 'reasonable possibility' of harm does not, in fact, exist in the particular industry." *Id.* at 1146. The court admonished that "Robinson-Patman has not ushered in a bizarre rule of law that exalts theory 'no matter what' in the face of hard, cold facts." *Id.* The court pointed out that the competitive injury requirement of the Act dictates a "fact-intensive" analysis of "the competitive terrain upon which the players do battle." *Id.* at 1130.

In its initial decision in *Boise Cascade*, the FTC had adopted an approach to *Morton Salt* similar to that adopted by the

Ninth Circuit in this case. The FTC inferred injury to competition from a longstanding pricing practice that accorded a functional discount to all wholesalers and dual distributors, large and small. Such discounts were not provided to distributors who chose not to undertake the risks and costs of performing the wholesale functions required to meet the manufacturers' objective standards. In finding competitive injury, the FTC relied solely on the inference, acknowledging that FTC complaint counsel had presented no "direct evidence" of displaced sales attributable to the functional discount. *Boise Cascade*, 107 F.T.C. at 206. Nonetheless, the FTC refused to consider in rebuttal the substantial evidence

> (1) that competition among dealers generally was healthy, (2) that the selected dealers singled out for FTC examination were thriving, and (3) that this happy picture of prosperity was apparently unclouded by instances of diverted sales attributable to the challenged discounts.

Boise Cascade, 837 F.2d at 1143-44. The FTC deemed such evidence irrelevant in the face of *Morton Salt*'s "self-evident" inference. *Boise Cascade*, 107 F.T.C. at 208-09.

The District of Columbia Circuit correctly held that the *Morton Salt* inference "manifestly does not create an irrebuttable presumption of competitive injury." *Id.* at 1144. Observing that this Court had concluded in *Falls City*, 460 U.S. at 435, that the inference may be overcome "by evidence breaking the causal connection between a price differential and lost sales or profits," the Court of Appeals held that "[i]n reason, *the inference can also be overcome by evidence showing an absence of competitive injury within the meaning of Robinson-Patman*." *Boise Cascade*, 837 F.2d at 1144 (court's emphasis). The court criticized the FTC for employing *Morton Salt* "to presume competitive injury conclusively" and held that

"[s]pecific, substantial evidence of [the] absence of competitive injury is, in our view, sufficient to rebut what is, after all, only an inference." *Id.*[8] As the Court of Appeals stated, the FTC's approach "is nothing less than an all-out attack on uniform wholesale prices to dual distributors." *Id.* at 1148.

In remanding the *Boise Cascade* case to the FTC, the court instructed the Commission to consider the evidence which indicated that no competitive injury had resulted or was likely to result from Boise Cascade's receipt of the functional discount, including: (1) the increasing sales and profits of the allegedly disfavored purchasers; (2) the "strikingly low" number of lost accounts and the fact that lost accounts were "very much a two-way street;" (3) the complete absence of evidence suggesting that any displaced sales were attributable to the functional discount; (4) that after 40 years of functional discounts, the industry remained "vibrant, dynamic" and highly competitive; and (5) the complete absence of a "regime of favoritism towards Boise" in that the manufacturers treated all wholesalers and dual distributors alike. *Boise*

[8] Properly applied, the *Morton Salt* "inference" operates as a legal presumption to shift the burden of producing evidence to the party against whom the inference was drawn. *See, e.g., Falls City*, 460 U.S. at 435; *Boise Cascade*, 837 F.2d at 1144; *see also Boise Cascade*, 837 F.2d at 1154 (Mikva, J., dissenting). This Court has held that a presumption is rebutted by the production of evidence sufficient to raise "a genuine issue of fact" as to the existence of the presumed fact. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). Once such evidence is produced, the presumption is rebutted, and the burden shifts back to the plaintiff to present evidence sufficient to prove the presumed fact without the benefit of the rebutted presumption. *Id.* at 255; *see also Johnson* v. *Transportation Agency*, 480 U.S. 616, 107 S. Ct. 1442, 1449 (1987); *O'Brien* v. *Equitable Life Assur. Soc. of United States*, 212 F.2d 383, 386-87 (8th Cir. 1954). If plaintiff fails to produce such evidence, it does not satisfy its ultimate burden of persuasion. *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 111 (1941).

Cascade, 837 F.2d at 1144-47. The import of the court's remand is that a pricing practice should not automatically be condemned under the aegis of *Morton Salt* without an analysis of the precise competitive circumstances giving rise to the practice and the likely competitive consequences thereof. *See also* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 173, 181-82, 186-95 (1962).[9]

In determining the likely competitive impact of a pricing practice, it is critical to remember that the Robinson-Patman Act, like the other antitrust laws, "is directed to the preservation of competition" and not the protection of competitors against economic loss. *Boise Cascade*, 837 F.2d at 1143; *see also Richard Short Oil Co.* v. *Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984). This basic principle is not merely an "oft-quoted chestnut" as the Ninth Circuit would have it. *See Hasbrouck*, 842 F.2d at 1040. Rather, as so aptly stated by the court in *Boise Cascade*, injury to competition is "*the name of the Robinson-Patman game*." *Boise Cascade*, 837 F.2d at 1143 (emphasis added). Price differentials are prohibited by the Act only if they tend to "injure, destroy, or prevent *competition with* any person who either grants or knowingly receives the benefit of such discrimination." 15 U.S.C. § 13(a) (emphasis added).

The legislative history of Robinson-Patman's injury standard makes clear that Congress sought to prohibit pricing practices that might lead to the destruction of *competition*, not merely lost revenue by individual competitors. *See, e.g.*,

[9] It should be noted that this Court has never sanctioned the use of the *Morton Salt* inference in a Section 2(f) case. This Court's prior decisions under Section 2(f) raise substantial doubt regarding the propriety of applying the inference in actions against a buyer that merely accepts the lower prices offered by sellers. *See Boise Cascade*, 837 F.2d at 1148 n.1 (Williams, J., concurring).

Kintner, at 3066, 3073-74, 3085, 3095, 3175, 3179, 3186, 3194-95, 3232, 3236, 3369, 3371-72. It is apparent from the congressional debates that the principal concern of Congress was to prevent large buyers from achieving a monopoly by "completely driv[ing] out of existence those who are engaged in like business with smaller capital." Kintner, at 3073. Therefore, the Act is implicated only where price differentials result in the likely impairment of a firm's ability to compete. *See Richard Short Oil*, 799 F.2d at 420 ("injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business").

Failure to thoroughly analyze the competitive facts can result in applications of the Robinson-Patman Act to pricing systems that present no risks to competition and that Congress did not intend to prohibit. Because functional discounts employed in competitive industries are most likely to be procompetitive and contribute to the efficient distribution of products, they should not automatically be condemned without analysis of their potential and actual competitive effects. Inappropriate applications of the statute would foster a pattern of constrained pricing and impose distribution practices that are at odds with the free and open competitive system that the antitrust laws are designed to preserve.

Boise Cascade respectfully submits that if the Court determines in this appeal that the *Morton Salt* inference is to be extended to price differentials arising from functional discounts, it should adopt the District of Columbia Circuit's approach in *Boise Cascade* to the application and rebuttal of the inference. The Court should require the lower courts and the FTC to consider in rebuttal of the inference all evidence bearing on the potential and actual competitive effects of the challenged discount, including evidence indicating the absence of competitive injury and evidence breaking the causal connection between the challenged discount and any

alleged competitive injury. A complete assessment of the competitive effects of a functional discount requires an evaluation of the structure of the particular industry, the history and purpose of the discount in that industry, the functions required to be performed in order to obtain the discount, the availability of the discount to the allegedly disfavored purchasers, the financial health and competitive vigor of the allegedly disfavored purchasers, the extent of new entry in the industry, the extent of sales diversion between favored and disfavored purchasers and the reasons for any such sales diversion — that is, whether it reflects the operation of a competitive market or a competitive advantage arising from the discount. Only in this way can the Robinson-Patman Act be limited to pricing practices that truly have anticompetitive potential.

CONCLUSION

Boise Cascade respectfully submits that this Court should hold that the *Morton Salt* "self-evident" inference of competitive injury should not be extended to functional discounts. However, if this Court determines to extend the inference to such discounts, Boise Cascade respectfully submits that the Court should require a full assessment of the facts bearing on competitive injury in determining whether the inference has been rebutted.

Respectfully submitted,

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August 3, 1989

No. 87-2048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TEXACO INC.,
Petitioner,
v.
RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONER

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In The

Supreme Court of the United States

October Term, 1989

No. 87-2048

Texaco Inc.,

Petitioner,

v.

Ricky Hasbrouck, d/b/a Rick's Texaco, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF THE AMERICAN PETROLEUM INSTITUTE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The American Petroleum Institute ("API") and the National Association of Manufacturers of the United States of America ("NAM"), hereby seek leave pursuant to Rule 36.3 to file the attached brief as *amici curiae* in support of the Petitioner, Texaco Inc. ("Texaco"). While consent to file this brief has been obtained from Petitioner, Respondents have declined to grant their consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

API, a District of Columbia corporation, is a national trade association. It counts over 200 companies among

its membership, representing all facets of the petroleum industry: exploration, production, transportation, refining, and marketing. Many of API's members are engaged in marketing at both the wholesale and retail levels.

NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. NAM represents some 13,000 companies located throughout the nation's fifty states, providing 85 percent of this country's manufacturing employment. NAM members produce 80 percent of all domestically manufactured goods. NAM is affiliated with 158,000 additional businesses through its relationship with the Associations Council and the National Industrial Council.

As a principal representative of America's manufacturing community, NAM has had a long history of interest and involvement in matters affecting the marketing and distribution of manufactured products. In that role, NAM has participated repeatedly as *amicus curiae* before this Court on issues critical to the nation's industry. So too, API has frequently participated on its industry's behalf in legislative, administrative, and judicial proceedings which present issues of national concern. This case presents just such an issue.

The implications of the Court of Appeals decision in *Hasbrouck* go far beyond the specific dispute between the parties here to encompass questions that affect the marketing of a wide variety of goods and commodities for sale throughout the nation. The members of both NAM and API have a vital interest in this Court's review of the *Hasbrouck* decision because many of them employ wholesale discounts in dual channel distribution systems in all parts of the country.

NAM and API believe their participation as *amici curiae* will provide the Court with a broader perspective on the principal question presented and will bring into focus the national significance of the distribution issue at the heart of this case. Accordingly, API and NAM respectfully seek the Court's leave to file the attached brief supporting Petitioner.

Respectfully submitted,

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August 3, 1989

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QUESTION PRESENTED

This *amicus* brief addresses a single question: whether the fact that a supplier's uniform price to wholesalers is lower than its price to a retailer purchasing directly from the supplier can support a price discrimination claim by the retailer under Section 2(a) of the Robinson-Patman Act.

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BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONER

This brief is submitted on behalf of the American Petroleum Institute and the National Association of Manufacturers as *amici curiae* in support of the Petitioner.

INTEREST OF *AMICI CURIAE*

The interest of *amici* is set out in the foregoing motion for leave to file this brief.

STATEMENT

Petitioner Texaco Inc. sold gasoline in the Spokane, Washington area until 1981. Respondents are twelve owners of retail service stations that purchased gasoline

directly from Texaco. Texaco also sold gasoline to two independent wholesalers in the Spokane area, Dompier Oil Company and Gull Oil Company. Texaco's price to the two independent wholesalers was less than its price to direct-buying retailers. Throughout the period at issue both Dompier and Gull resold at least a portion of the gasoline to independent retailers; Dompier sold exclusively to independent retailers until 1974. Pet. App. B4 n.4.

Respondents sued Texaco, alleging a violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). Respondents claimed that the wholesalers' price to retailers was less than Texaco's price to respondents, and that this price difference enabled the wholesaler-supplied service stations to undercut respondents' retail prices and so divert sales from respondents. The jury found for respondents and awarded untrebled damages of $449,900.

Texaco argued, both in the District Court and the Court of Appeals, that it had not violated Section 2(a) because it charged uniform prices to wholesalers and controlled neither the independent wholesalers' decision whether to pass through some portion of the discount to retailers, nor the retailers' decision whether to pass the discount through to consumers. The Court of Appeals nevertheless held that "a section 2(a) violation may occur if (1) the discount [the wholesalers] received was not cost-based and (2) all or a portion of it was passed on by [the wholesalers] to customers of theirs who competed with Hasbrouck." Pet. App. A8 (citations omitted). The Court of Appeals concluded that Texaco's wholesale prices were not cost-based because Texaco merely identified some of the functions performed by the wholesalers without providing an acceptable "quantitative justification" for the discount. *Id.* The Court of Appeals also concluded that respondents presented evidence sufficient to show that the wholesalers had passed through at least a portion of the discount to their retailer customers. *Id.* at A9.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Ninth Circuit in effect holds that the long-established and procompetitive practice of granting a uniform discount to wholesalers may constitute illegal price discrimination if there are also direct sales at a higher price to retailers in the same market. The court ruled that "sufficiently substantial" uniform discounts to wholesalers, which are not received by direct-buying retailers, may violate Section 2(a) if they are not based on the wholesalers' costs and a portion of the discount is passed on to retailers who compete with the direct-buying retailers. Pet. App. A8-A9.

The Court of Appeals decision, if not reversed, can have serious anticompetitive consequences for many markets throughout the country. The practice of simultaneous distribution by suppliers through wholesalers and through direct-buying retailers (a form of dual distribution) occurs throughout the economy, and reflects efforts by suppliers to maximize efficiency in distribution. But the Ninth Circuit's decision puts this method of distribution in jeopardy since there is no practical or legal way for suppliers to assure themselves that functional discounts to wholesalers are "cost-based" or not passed on to retailers. Conseqeuntly, the court's interpretation confronts suppliers with the unpalatable choice of treading close to the boundaries of vertical price-fixing or eliminating wholesale discounts or dual distribution entirely. Either course will harm competition and raise prices to consumers. And this will be so although it would be economically irrational for a supplier deliberately to price to wholesalers so as to injure the supplier's own retail customers, although the supplier is not discriminating between competitors since wholesalers and retailers operate at separate levels of the distributional chain, and although there is no reasonable basis on which a supplier should be held responsible for the consequences of independent pricing decisions by independent wholesalers.

The Ninth Circuit's interpretation is not required by the language of the statute or by its legislative history, and is at odds with a line of judicial decisions that uniform functional discounts do not violate the Act. Accordingly, the decision should be reversed.

ARGUMENT

I. THE DECISION BELOW INHIBITS COMPETITIVE PRICING AND INTERFERES WITH EFFICIENT MODES OF DISTRIBUTION

This Court has said repeatedly that the Robinson-Patman Act should be interpreted consistently with the procompetitive purposes of the antitrust statutes considered as a whole. *See Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978); *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953). The decision below has ignored this principle. The ruling will harm consumers by inhibiting competitive pricing decisions by independent wholesalers, and by curtailing the use of economical and efficient distribution arrangements, all to the detriment of competition.

A. Dual Distribution Exists For Legitimate and Procompetitive Reasons

There are a variety of reasons that impel a supplier, to sell in the same area both to direct-buying retailers and to wholesalers who resell to retailers. Suppliers, attempting to maxmize returns from sales of their product, seek efficient distribution systems that deliver optimum products and services at minimum cost. Some retailers may be particularly capable of direct purchasing, whereas other retailers, sometimes smaller ones or those in rural locations, can best be served by wholesalers. Or the existence of dual distribution may reflect the continuing efforts of a supplier to stay abreast of a rapidly changing

market where shifts in demographics, economics, technology and product composition require flexibility and experimentation in differing modes of distribution. In other cases dual distribution may result from the fact that geographical areas best served by differing methods of distribution are partially overlapping.

Dual distribution is used by both large and small suppliers. Indeed, for some smaller manufacturers with limited resources, utilizing wholesalers for distribution while at the same time making direct sales to certain retailers is a near necessity. In addition, for suppliers of all sizes, each channel of distribution serves as a check on the efficiency of the other.

In the particular case of distribution of petroleum products, a Department of Energy study of petroleum marketing concluded that wholesalers frequently "are more efficient or better positioned to distribute in more widely dispersed areas where distribution costs tend to be relatively high for refiners." U.S. Department of Energy, "Draft—Deregulated Gasoline Marketing: Consequences for Competition, Competitors, and Consumers" 43 (March 1984). Moreover, since a dual distribution system allows two distribution channels—refiner to wholesaler to retailer, and refiner to retailer—to operate side by side in the same geographic area, competition in distribution is enhanced. Hence, the Department of Energy observed that in geographical areas where a supplier's product is distributed both through wholesalers and direct-buying retailers, competition is particularly intense and "the consumer [is] the ultimate beneficiary." *Id.* at 126.

B. Functional Discounts To Wholesalers Are Traditional and Procompetitive

Where a supplier has decided that it is efficient to use wholesalers to sell to a market, in addition to direct selling to retailers, it is customary to sell to the wholesalers at a lower price. Otherwise, the wholesaler's price to

retailers would inevitably exceed the supplier's own price to retailers, and the wholesalers would not long survive.

For many years prior to the *Hasbrouck* ruling—and, indeed, prior to passage of the Robinson-Patman Act—suppliers have sold their products to wholesalers at favorable prices, reflecting so-called functional or trade discounts, which roughly recognize the fact that the wholesaler is undertaking for the supplier responsibility for certain marketing and distribution functions. *See* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 3-4 (1962 & 1964 Supp.). Such functional discounts remain extremely common today.[1]

There is a built-in reason why wholesaler discounts will not be excessive in a dual distribution situation. Suppliers, having chosen a dual distribution system, have no reason to price so low to wholesalers that direct-buying retailers cannot compete with wholesaler-supplied retailers. The supplier has an incentive to offer the independent wholesaler a discount sufficient to induce it to service retailers that cannot economically buy directly from the supplier. But a supplier has no incentive to offer an excessive wholesale discount, since that in effect would give the wholesaler an unnecessary advantage in competing with the supplier itself for sales to retailers.

Moreover, if the supplier miscalculates by granting a larger than necessary discount to wholesalers, the miscalculation will be self-correcting since once the supplier finds that it is losing sales to wholesalers, it is likely to respond by adjusting the price differential between its price to wholesalers and its price to retailers. In addition, it is by no means clear that a miscalculation will re-

[1] Although in this case the price to wholesalers apparently was calculated as a discount off the tank-wagon price to retailers, and we therefore use the term "wholesaler's discount," in other situations the lower price to wholesalers in recognition of their functions may not be expressed as a "discount" from another price.

sult in even a transitory injury to competition. The independent wholesaler makes a variety of decisions for a number of reasons. It may simply pocket the larger discount as additional profits rather than passing it on to retailer customers. Or if it opts for a lower price, this may not be because of the discount but may be because it is unusually efficient, or unusually aggressive.

Consequently, it makes little economic sense to suppose that a supplier will adopt a price differential in favor of wholesalers that will have the effect of driving its direct-served retailers out of business. That observation is pertinent because the Court has said, in the context of Section 1 of the Sherman Act, that courts should be skeptical of an antitrust claim that "makes no economic sense." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

There are, to be sure, complications that can arise in use of the wholesalers' discount in a dual distribution situation. These occur when the wholesaler is not independent and is a mere front for a supplier or a retailer. A so-called wholesaler may have no purpose other than to serve as a conduit for discounts to retailers that have organized it or otherwise control it. Or a supplier may channel sales through a "dummy" wholesaler that the supplier effectively controls, setting the price at resale, for the sole purpose of insulating the transaction from a claim that it favored the indirect buyer.[2]

[2] In this situation the wholesaler's customer will be regarded as an "indirect purchaser" from the supplier. It has been observed that "[c]ontrol over the resale price is the *sine qua non* for finding a wholesaler's customer to be the purchaser in fact." H. Shniderman & B. Leverich, *Price Discrimination in Perspective* 30 (2d ed. 1987). *See, e.g.*, *Barnosky Oils, Inc.* v. *Union Oil Co.*, 665 F.2d 74, 83-84 (6th Cir. 1981); *Purolator Prods., Inc.* v. *FTC*, 352 F.2d 874, 883-84 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968).

But these complications are not present here.[3] The holding of the court that the wholesalers' discount was illegal was applied to transactions that did not suffer from the claim that the wholesalers were organized by and were a mere front for retailers;[4] and the indirect purchaser doctrine was not implicated since Texaco did not control the wholesaler and could not control the price at which the wholesalers resold.

The decision under review has attacked traditional discounts to independent wholesalers despite the fact that adverse effects upon direct-buying retailers are speculative, unpredictable, and highly unlikely to result from the discounts, and despite the fact that such discounts advance competition by facilitating the operation of dual distribution systems.

C. The Opinion Below Inhibits Competitive Distribution Arrangements

In this case, the Court of Appeals has contrived a novel doctrine that extends the reach of the Robinson-Patman Act with anticompetitive consequences.

The court held that when a wholesaler's discount was "sufficiently substantial", the discount must be justified by the costs of the services the wholesaler performs because if the discount exceeded the wholesaler's costs and a portion of the discount were passed on to retailers who competed with the direct-buying retailer, the Robinson-Patman Act would be violated.[5] Pet. App. A8. Since wholesaler discounts typically are not *de miminis*, such discounts could, in the view of the Court of Appeals, be illegal unless (1) the discount is based on the wholesaler's costs (and no surplus for passing-on remains), or (2) care is somehow taken to prevent a portion of the discount from being passed on to retailers who compete with directly purchasing retailers. Pet. App. A8.

The rule formulated by the Court of Appeals as a practical matter requires the supplier to come close to engaging in forbidden anticompetitive practices or to alter its distribution methods to the detriment of efficiency and competition.

1. *The Supplier Should Not Be Held to Cost-Based Discounts*

The Court of Appeals indicates that a wholesale discount would be legal if it could be shown to be accounted for by the costs of the services the particular wholesaler

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[3] This brief focuses only on the wholesalers' role in reselling to retailers; it does not address such questions as may arise from retail sales by wholesalers.

[4] The suggestion in the opinion of the Court of Appeals that the discount to the wholesaler in this case "does not qualify as a functional or wholesale discount," Pet. App. A7, is the court's way of stating that it was not satisfied that "the services [Texaco's] wholesalers performed justified the amount of the discount," Pet. App. A8, n.4, but it was not a suggestion that the wholesalers were not independent business entities. The District Court's opinion noted that Texaco introduced "evidence that Dompier and to some extent Gull were performing marketing and advisory functions . . . ." Pet. App. B6 n.5.

[5] The stringency of the required correlation between the discount and the cost of the wholesalers' functions is unclear. The Court of Appeals uses differing formulations: *e.g.*, a discount raises questions if "in excess of the value of the services," Pet. App. A7-A8; the discount is to be "cost-based," *id.* at A8; the discount is to be "justified by the services" the wholesaler performs, *id.* at A9; the discount is suspect when "unrelated to the costs of the customer's function," *id.*; etc. It is clear, however, that the court below requires at least that there be a rough equivalency between the discount and the costs of the wholesaler's services; should the discount exceed those costs, according to the court, the supplier is on notice that the discount may, in part, be passed on to retailers to the detriment of direct-buying retailers. At no point does the court appear to acknowledge that the supplier is unlikely to know the wholesaler's costs, or that the wholesaler, as an independent business entity, could decide not to pass on the discount, or that a wholesaler's price may reflect the totality of its efficiencies or simply a competitively aggressive pricing policy.

performed. Pet. App. A8. The court appears to reason that, should the discount merely compensate the wholesaler for the cost of the functions it performs, there would be no price break to pass through to retailers. But a supplier rarely if ever has access to detailed information about the cost of services performed by independent wholesalers. Wholesalers themselves may not always possess such information; but even if they had it, they would be predictably and properly reluctant to share it with suppliers, particularly suppliers who compete with them by making sales directly to retailers. *Cf. United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). Moreover, even if the relevant information existed and were made available to the supplier, difficult questions would arise as to the allocation of costs of services to various suppliers (where the wholesaler buys from more than one supplier) and as to the valuation of the costs of such diverse services, provided by wholesalers, as product promotion, extension of credit, and various types of advice, sometimes informal, and assistance, to retailers. Moreover, in setting its price to wholesalers, the supplier is also responding to competition from other suppliers selling to other wholesalers or to the same wholesalers and cannot always calibrate its prices as it pleases.

There are other flaws in the concept of a system of cost-based wholesaler discounts. First, any such system, even if practical, may well have the perverse and anticompetitive effect of destroying the wholesaler's incentive to operate an efficient low-cost business since increases in efficiency will be offset by a smaller discount. If, moreover, a supplier were to charge different prices to different wholesalers on the basis of the supplier's necessarily imperfect estimate of each wholesaler's cost of doing business, the supplier would be vulnerable to a conventional claim of price discrimination by its wholesalers.[6] Nor

[6] The Court of Appeals observed that one of the wholesalers in question had no bulk plant for temporary storage and that in the case of the other wholesaler, Texaco "in some instances" delivered gasoline directly to the wholesaler's customers. Pet. App. A8. It criticized Texaco for merely identifying some of the wholesaler functions and not providing a quantitative justification based on the wholesalers' costs for the discounts. *Id.* But Texaco, in establishing a distribution system, could well conclude that so long as it dealt with wholesalers that were independent business entities and that relieved it of some of the burdens of distribution to dealers, as these wholsalers did (the District Court referred to evidence of marketing and advisory functions, Pet. App. B6, n.5), it would not draw fine lines by providing varying discounts among its wholesalers, particularly in view of the absence of reliable information as to wholesaler costs.

could the supplier then invoke the statutory affirmative defense of cost justification, since that defense focuses on the supplier's costs, not those of the wholesaler. *Boise Cascade Corp.*, 107 F.T.C. 76, 211-12 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988); *Mueller Co.*, 60 F.T.C. 120, 127-28 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964).

In sum, the legality of a wholesale discount cannot and should not turn on the ability of the supplier to relate it to the costs of each wholesaler.

2. *The Supplier Cannot Legally Prevent Wholesalers From Passing on All or Part of Their Discounts*

Since suppliers cannot realistically correlate their discounts to wholesalers' costs, the only alternative left by the formulation of the rule in the decision below is that the suppliers somehow see to it that no portion of the wholesaler's discount is passed on to the wholesaler's customers.

Of course, since wholesalers are independent business entities, any program of control of wholesalers' prices would be flatly incompatible with the settled rule that vertical agreements on resale prices are *per se* violations of Section 1 of the Sherman Act. *Business Electronics*

Corp. v. *Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44, 46-47 (1960). Threatening to terminate wholesalers for failure to adhere to the suppliers' suggested prices may constitute a Section 1 violation. *See Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 765-68 (1984). And there is no basis for assuming that a vertical price-fixing arrangement could be justified by an asserted desire to comply with the Robinson-Patman Act. *Cf. United States* v. *United States Gypsum Co.*, 438 U.S. 422, 459 (1978).

Yet, the decision below may well have effects similar to those of resale price-fixing. Suppliers' attention will be directed to the pricing policies of their wholesalers, and by one means or another wholesalers may be led to understand that aggressive pricing is undesirable to suppliers. Indeed, the mere existence of the legal rule adopted by the Ninth Circuit is likely to encourage a wholesaler to follow the price leadership of its suppliers. And this will be so whether or not aggressive pricing by the wholesaler that otherwise may have occurred is made possible by wholesaler discounts or by wholesaler efficiencies. The opinion, in short, may stimulate behavior that will have anticompetitive consequences. Nor is the result any more palatable should concern with Sherman Act liability prevent any attempt to influence wholesalers' pricing decisions; then, as will be discussed below, the realistic recourse for the law-abiding supplier is to change its distribution to less efficient modes, again to the detriment of competition.

The anticompetitive sweep of the opinion below is not narrowed by reading it, as the Solicitor General's initial brief suggests, as applicable only if the supplier "knows" or "should know" that his wholesaler's customer is underpricing his direct retailer. Should the opinion below

survive, direct-buying retailers will inevitably take advantage of it by placing their suppliers "on notice" that wholesalers are underpricing them because of wholesaler discounts. Being so placed on notice, suppliers, inevitably lacking adequate information on wholesaler costs, would face the choice of coming close to the reach of the Sherman Act's prohibition against resale price agreements or accepting the inefficient and anticompetitive alternative of eliminating wholesaler discounts or discontinuing desirable dual distribution.

It follows, then, that in dual distribution situations the Court of Appeals has made the legality of wholesale discounts turn on knowledge (of wholesaler costs) that the supplier does not have; on activity (resale pricing) that suppliers cannot lawfully control; and on effects (lower prices to consumers) that are likely to be wholly procompetitive.

3. *The Supplier's Lawful Alternatives Reduce Efficiency and Competitiveness*

Since suppliers can neither ensure that wholesale discounts are "cost-based" nor lawfully prevent them from being passed on to retailers, they are left with but two legal means of complying with the Court of Appeals decision. Both are certain to have serious anticompetitive effects. First, a supplier could simply eliminate wholesale discounts and charge the same price to all customers, whether wholesaler or retailer.[7] At a minimum, this would adversely impact the wholesalers and the retailers who rely on them, who are often smaller retailers that

[7] Although selling to those performing wholesaling functions at the same price as to retailers may be regarded as a form of economic discrimination, "the lower federal courts have consistently held that the practice of selling to all purchasers at a uniform price is legal. . . ." Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. & Com. L. Rev. 543, 550 (1976).

cannot effectively buy directly from the supplier. Such a result would be directly contrary to the underlying purpose of the Robinson-Patman Act, which was to prevent the lessening of competition that could arise from price favoritism to large, direct-buying chain stores over small retailers. *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3-5 (1936).

The supplier's alternative means of complying with the Ninth Circuit's decision is equally inimical to competition and the purposes of the Robinson-Patman Act. Rather than abandoning wholesale discounts, the supplier might abandon dual distribution and sell exclusively to retailers or wholesalers, but not both, in a geographic market. Should the supplier elect to continue selling directly to large retailer customers, small retailers would lose out. In some markets this may deprive consumers of a convenient source of supply. Should the supplier elect to distribute its product solely through wholesalers, consumers would lose the benefits of an efficient dual distribution system, and may face higher prices as a result.[8]

II. NEITHER THE STATUTE NOR JUDICIAL PRECEDENT REQUIRES AN ANTICOMPETITIVE RULE

This Court should not adopt an extension of the Robinson-Patman Act so anticompetitive in its effects unless it is compelled to do so by the plain language of the statute, by clear legislative intent, or by a great weight of judicial precedent. In this case, the Court is under no such compulsion.

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[8] A supplier may seek to defend its price on a meeting competition ground. But suppliers may be wary of undertaking that burden. It should also be noted that there may be legal constraints against discontinuing supplies to current purchasers. The Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322, codified at 15 U.S.C. §§ 2801-41, for example, may prevent gasoline refiners from discontinuing sales to wholesalers or retailers. Where that is the case, the supplier's only recourse is to stop granting a functional discount.

Section 2(a) of the Robinson-Patman Act provides, in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

15 U.S.C. § 13(a). Absent the final clause of this provision, there would be no reason to think a uniform wholesale discount in a dual distribution situation could violate the statute, since retailers do not compete with either the person who grants the discount (the supplier) or the person who receives it (the wholesaler). The final clause, "or with customers of either of them," is far from being lucid or self-explanatory.[9]

The legislative history, to the extent it addresses functional discounts, indicates they were not among the evils aimed at by Congress. *See* S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8-9 (1936). Indeed, when one examines the origin of the "customers of either of them" clause, the recourse

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[9] For example, that phrase is redundant insofar as it refers to customers of the person who grants the discrimination; that is simply another way of describing "any person who . . . receives the benefit of such discrimination." In addition, the phrase may refer only to customers on the same functional level of purchasers on the same functional level. Or it may refer to customers on the same functional level of purchasers on different functional levels, but only where the price differentiation between the purchasers necessarily results in discrimination between the customers (as where a retailer, further down the distribution chain, receives a more favorable price from the supplier than does a wholesaler).

to that clause in the ruling below becomes even more dubious. This is because the "customers of either of them" concept was introduced by H. B. Teegarden, the General Counsel for the United States Wholesale Grocers' Association. To Amend the Clayton Act: Hearing before the House Committee on the Judiciary on H.R. 8442, H.R. 4995, H.R. 5062, 74th Cong., 1st Sess., 244, 251-52, 262 (1935). It is hardly likely that Mr. Teegarden, as counsel for a group of wholesalers, would have proposed language intended to place uniform wholesale discounts in jeopardy in dual distribution situations.

Nor does judicial precedent require or support the Ninth Circuit's use of the "with customers of either of them" clause. For decades antitrust lawyers have advised their clients that selling to wholesalers at a discount does not violate the Robinson-Patman Act, since wholesalers do not compete with direct-buying retailers. A great weight of authority supports this view.[10]

[10] The Solicitor General agrees with Petitioner that "[a] rule broadly subjecting suppliers to the threat of damage liability if an independent wholesaler elects to undercut the supplier's price to retailers—and a jury later concludes that the wholesale discount was not cost based—would represent a significant extension of the law." Br. for United States 9. It acknowledges that such an extension would "undercut the procompetitive purposes of the antitrust laws." *Id.* at 11. The Solicitor General's brief, in the course of arguing that this particular case does not warrant review by this Court, attempts to distinguish several cases cited by *amici* that they concede contain "general statements" that uniform wholesale discounts are legal. *Id.* at 13 n.15. These attempted distinctions are unpersuasive. The court in *White Indus., Inc.* v. *Cessna Aircraft Co.*, 845 F.2d 1497 (8th Cir. 1988), *cert. denied*, 109 S.Ct. 146 (1988), clearly upheld the legality of a two-channel distribution system based on a uniform discount to wholesalers. The court did *not* say the Act would have been violated if the wholesaler "passed on the discount to end users," Br. for U.S. 13 n.15, but rather that it would violate the Act if wholesalers *"sold aircraft directly to end-users"*—that is, competed with direct-buying retailers. 845 F.2d at 1498 (emphasis supplied). The Solicitor General does not attempt to distinguish the statement in *Eximco, Inc.* v. *Trane Co.*, 737 F.2d 505, 515 (5th Cir. 1984) that "[a] plaintiff alleging secondary-line injury must prove that a seller made a sale to two different buyers at the same functional level of competition, charging different prices to each," but merely notes that this was not the narrow holding of the case. Br. for U.S. 13 n.15. *Dart Indus., Inc.* v. *Plunkett Co.*, 704 F.2d 496 (10th Cir. 1983) does far more than simply "reject the naked assertion that different prices charged to a wholesaler and to a retailer are necessarily unlawful," Br. for U.S. 13 n.15; it states that "[t]he difference in the prices charged to [a wholesaler] and those charged to [retailers] do not constitute a Robinson-Patman violation . . . . Illegal price discrimination requires that the same product be sold at different prices to competitors." 704 F.2d at 499. These statements by federal courts of appeals are echoed by the FTC's recent statement that "[i]f the wholesaler does not sell to end-user customers in competition with the retailer, the difference in the prices that the wholesaler and the retailer pay cannot support a claim of secondary line competitive injury under the Act." *Boise Cascade Corp.*, 107 F.T.C. 76, 199, *rev'd and remanded on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). *See also Pierce* v. *Commercial Warehouse*, 1988-1 Trade Cas. (CCH) ¶ 68,009 at 58,164 (N.D. Fla. 1988) ("Where a manufacturer sells to jobbers at one price and to retailers at another price, a retailer who bought from the jobber has no complaint under the Act because he paid a higher price for the same goods than his retailing competitor who bought directly from the manufacturer."). In short, there can be no serious dispute that the Ninth Circuit's opinion significantly breaks with prior law.

The Ninth Circuit purported to recognize that charging different prices to customers at different levels of distribution generally does not violate the Robinson-Patman Act, Pet. App. A7, A9, but nevertheless reached the conclusion that "a section 2(a) violation may occur if (1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with [direct-served retailers]." *Id.* at A8.

The Court of Appeals cited three cases as authority: *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969); and *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). *Morton Salt and Vanco* are inapposite;

Perkins need not and should not be read to stand for the anticompetitive result reached by the Ninth Circuit.

In *Morton Salt* the supplier granted a "standard quantity discount" that was uniquely available only to five large direct-buying retailers, who therefore paid less than wholesalers and were able to sell at retail more cheaply than to wholesalers could sell to their retailers, some of whom competed with the favored retailers. 334 U.S. at 41. *Morton Salt* also involved differences in prices between "wholesalers and retailers who competed with other wholesalers and retailers." *Id.* at 42.

The *Morton Salt* decision is clearly inapplicable to the case at hand. Where the price break goes to those further down the chain of distribution, there can be little doubt or speculation as to the adverse impact on other retailers who buy from the disfavored wholesalers.[11] Moreover, this abuse of quantity discounts was one type of situation expressly aimed at by the Act.[12] No uniform functional discount to wholesalers was involved or challenged.

In *Vanco* a beer supplier charged different prices to two wholesalers. This disparity, not surprisingly, was reflected in their respective prices to their retailers, who were in competition with one another. Charging different prices to customers at the *same* distribution level is price discrimination of a conventional kind, and sheds little light on the treatment to be accorded a uniform wholesaler discount.

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[11] This consequence was so inevitable and apparent that the Court viewed the practice as one in which "manufacturers . . . sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." 334 U.S. at 50.

[12] The original provisions of Section 2 of the Clayton Act, which the Robinson-Patman Act corrected, did not prevent price discrimination on account of differences in quantity. Act of Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730.

Perkins, properly viewed, is also distinct from this case on its facts. In *Perkins* the favored customer controlled the subsequent purchasers, including the ultimate retailer. In effect, therefore, *Perkins* may be said to involve a sale by the supplier to a retailer at a different price than to other retailers. The Court observed that Signal (the favored buyer)

> "transferred the gasoline first to its subsidiary, Western Hyway, which in turn supplied [Western's subsidiary] the Regal stations. . . . We find no basis in the language or purpose of the Act for immunizing Standard's price discriminations simply because the product in question passed through an additional *formal* exchange before reaching the level of Perkins' actual competitor."

395 U.S. at 648 (emphasis supplied).

To be sure, the Court's opinion suggested that it would have made no difference if each of the buyers in the chain had been separately owned. *Id.* at 647. But the opinion has not been applied so broadly, and in any event should not be read as supporting the proposition that a supplier in a dual distribution situation may be liable for uniform discounts to independent wholesalers whose pricing practices are outside its control.[13]

CONCLUSION

A rule that subjects uniform functional discounts to independent wholesalers in a dual distribution situation to Robinson-Patman exposure would deter much procompetitive activity. In particular, a rule that turns on whether the amount of the price differential was justified by wholesaling costs would require a costly, detailed, and ultimately fruitless inquiry, and typically would call for

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[13] Since Perkins, the complainant, and Signal, the favored buyer, were both also wholesalers, the *Perkins* decision also can be viewed as involving discrimination at the same functional level and so as inapposite to the case at hand.

information that, if it exists at all, is not in the possession of the supplier when it makes its pricing decision. Such a rule would penalize any wrong guess as to wholesaler costs and any wrong judgment as to the resale pricing of the wholesaler. The rule, consequently, might discourage independent pricing by wholesalers. And this would be so whether the low price a wholesaler would have charged reflects a wholesale discount, an unusually efficient wholesaler, or simply an unusually aggressive competitor. Alternatively, the rule could lead to the demise of the wholesaler discount and of dual distribution.

Nor is the rule sustainable if narrowed to require actual knowledge on the part of the supplier of the effect of the wholesaler discount. It would then have a perverse result. The lowest-cost wholesalers, and those competing most agressively, would be the most likely to come to the attention of the supplier and so lose their discount. This in turn would discourage wholesalers from competing by cutting prices. Moreover, retailers will as a matter of course place suppliers on notice of supposed excessive discounts, with the same anticompetitive consequences as flow from the rule before narrowing.[14]

At the heart of the difficulty with the decision below is that the supposed discrimination between competing retailers results from a multiplicity of factors affecting independent wholesalers' pricing decisions that are not

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[14] The attention to what the supplier knew or should have known seems to have originated in Standard Oil Co. v. FTC, 173 F.2d 210, 217 (7th Cir. 1949), *rev'd*, 340 U.S. 231 (1951). In response to this decision, the FTC modified a paragraph of its order to forbid wholesale discounts only if Standard Oil knew its price to direct-buying retailers was higher than the price paid by competing retailers to wholesalers. 49 F.T.C. 923, 956 (1953). However, when the case came before this Court a second time, the Solicitor General abandoned the modified paragraph entirely and conceded that Section 2(a) of the Robinson-Patman Act was not properly addressed to such activities. Reply Brief for the Federal Trade Commission at 32, FTC v. Standard Oil Co., 355 U.S. 396 (1958).

controlled, or even known, by suppliers and that can reflect a variety of considerations other than the discount. Given the implausibility of suppliers acting deliberately to injure their own businesses with direct-buying retailers, and given the anticompetitive consequences of the ruling of the court below, the decision should be reversed and the Court should hold that uniform wholesaler discounts accorded independent wholesalers are not subject to challenge under the Robinson-Patman Act by direct-buying retailers.

Respectfully submitted,

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August 3, 1989

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(18)

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO INC.,

Petitioner,

—v.—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE POSITION OF PETITIONER

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the position of petitioner. Counsel for petitioner has consented to the filing of this brief; counsel for respondents has not.

INTEREST OF THE *AMICUS*

MVMA is a trade association organized as a not-for-profit New York corporation, and is composed of companies engaged in the manufacture and sale of motor vehicles in the United States. The member companies[1] build over ninety-seven percent of all motor vehicles produced in the United States.[2]

Motor vehicles are complex, costly, and durable products which require sophisticated servicing during the life of the vehicle. The consumer requires reliable and convenient service and replacement parts, and the manufacturer must meet these needs in order to maintain consumer goodwill and generate repeat business.

Motor vehicle manufacturers have developed varying distribution systems to meet these needs efficiently at every stage of the ownership life cycle. These systems involve the sale of thousands of service and replacement parts to the dealers who originally sold the motor vehicles to consumers, and in many cases also to other retailers of service and replacement parts, and to wholesalers who resell parts to sub-distributors, retailers and repair facilities. Motor vehicle manufacturers compete among themselves for the sale of service and replacement parts through these channels, and with numerous other domestic and foreign parts manufacturers as well. These two- and three-channel distribution systems are imperiled by the decision below which, if not reversed, threatens to impair the continuation of distribution systems that have developed in response to competitive market forces, and to raise the cost of motor vehicle parts substantially.

1 The members of MVMA are: Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Manufacturing, Inc.; Navistar International Transportation Corp.; PACCAR Inc.; and Volvo North America Corporation.

2 The various MVMA members also manufacture motor vehicle service and repair parts, as well as such diverse products as farm, industrial, lawn and garden tractors, other agricultural equipment, construction and mining machinery, locomotives, railroad railing stock, winches, and gasoline and diesel engines for numerous industrial and agricultural uses.

The decision below exposes motor vehicle manufacturers to massive legal uncertainties that threaten their efforts to develop and maintain the efficient and dependable distribution networks that are crucial to the continued success of their basic businesses. The Ninth Circuit's rule prevents motor vehicle manufacturers from tailoring their distribution systems as necessary to promote interbrand competition. If the decision below is not reversed, MVMA's members will no longer be certain that functional discounts offered on a non-discriminatory basis to all competing wholesalers will insulate them from the risk of liability to retailers under the Robinson-Patman Act. Such legal uncertainty will chill the ability of manufacturers to develop systems intended to create efficiencies.

The Ninth Circuit's requirement that wholesaler discounts must be cost-based disregards the economic fact that such discounts are to a great extent offered by motor vehicle manufacturers as an incentive for the wholesaler's services, and may or may not be fully reflective of the cost savings to the manufacturer. Moreover, the decision below has the perverse effect of punishing a manufacturer for its natural desire to find the most efficient (*i.e.*, lowest-cost) wholesalers, because it is precisely those wholesalers that can be expected to "pass on" cost savings and thus place the manufacturer in danger of being found liable under the Robinson-Patman Act. The Ninth Circuit rule will thus lead to the suboptimal distribution of motor vehicle service and maintenance parts and higher costs to consumers.

For these important reasons, MVMA respectfully requests that the Court accept and consider the accompanying brief.

Respectfully submitted,

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INTEREST OF THE *AMICUS*

Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") is a trade association organized as a not-for-profit New York corporation, and is composed of companies engaged in the manufacture and sale of motor vehicles in

the United States. The member companies[1] build over ninety-seven percent of all motor vehicles produced in the United States.[2]

Motor vehicles are complex, costly, and durable products which require sophisticated servicing during the life of the vehicle. The consumer requires reliable and convenient service and replacement parts, and the manufacturer must meet these needs in order to maintain consumer goodwill and generate repeat business.

Motor vehicle manufacturers have developed varying distribution systems to meet these needs efficiently at every stage of the ownership life cycle. These systems involve the sale of thousands of service and replacement parts to the dealers who originally sold the motor vehicles to consumers, and in many cases also to other retailers of service and replacement parts, and to wholesalers who resell parts to sub-distributors, retailers and repair facilities. Motor vehicle manufacturers compete among themselves for the sale of service and replacement parts through these channels, and with numerous other domestic and foreign parts manufacturers as well. These two- and three-channel distribution systems are imperiled by the decision below which, if not reversed, threatens to impair the continuation of distribution systems that have developed in response to competitive market forces, and to raise the cost of motor vehicle parts substantially.

Specifically, the United States Court of Appeals for the Ninth Circuit affirmed a verdict against an oil company that

1 The members of MVMA are: Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Manufacturing, Inc.; Navistar International Transportation Corp.; PACCAR Inc.; and Volvo North America Corporation.

2 The various MVMA members also manufacture motor vehicle service and repair parts, as well as such diverse products as farm, industrial, lawn and garden tractors, other agricultural equipment, construction and mining machinery, locomotives, railroad railing stock, winches, and gasoline and diesel engines for numerous industrial and agricultural uses.

sold products to wholesalers at lower prices than to retailers, declaring that the long-standing rule that the Robinson-Patman Act permits manufacturers to sell to wholesalers at lower prices than to retailers is not absolute. It held that there may be a violation when the discount is not closely tied to a particular wholesaler's distribution costs and is "passed on" by the wholesaler to retailers in the form of lower prices than those charged by the manufacturer to its direct retailer customers.

The decision below exposes motor vehicle manufacturers to massive legal uncertainties that threaten their efforts to develop and maintain the efficient and dependable distribution networks that are crucial to the continued success of their basic businesses. In direct contravention to the teachings of this Court in its Sherman Act decisions, the Ninth Circuit's rule prevents motor vehicle manufacturers from tailoring their distribution systems as necessary to promote interbrand competition. If the decision below is not reversed, MVMA's members will no longer be certain that functional discounts offered on a non-discriminatory basis to all competing wholesalers will insulate them from the risk of liability to retailers under the Robinson-Patman Act. Such legal uncertainty will chill the ability of manufacturers to develop systems intended to create efficiencies.

The Ninth Circuit's requirement that wholesaler discounts must be cost-based disregards the economic fact that such discounts are to a great extent offered by motor vehicle manufacturers as an incentive for the wholesaler's services, and may or may not be fully reflective of the cost savings to the manufacturer. Moreover, the decision below has the perverse effect of punishing a manufacturer for its natural desire to find the most efficient (*i.e.*, lowest-cost) wholesalers, because it is precisely those wholesalers that can be expected to "pass on" cost savings and thus place the manufacturer in danger of being found liable under the Robinson-Patman Act. The Ninth Circuit rule will thus lead to the suboptimal distribution of motor vehicle service and maintenance parts and higher costs to consumers.

SUMMARY OF ARGUMENT

The decision of the court of appeals is contrary to the long-established rule that manufacturers may offer lower prices to wholesalers than to direct retail accounts without fear of liability to customers under the Robinson-Patman Act. If this Court approves the significantly expanded interpretation of the Robinson-Patman Act enunciated by the Ninth Circuit, MVMA's members would be severely restricted in their ability to adopt distribution systems that provide the flexibility necessary to distribute thousands of service and repair parts efficiently to consumers. Instead, they will be forced to adopt systems that may not adequately reward wholesalers, particularly efficient ones, for the services they perform. Such a perverse result would be unprecedented and repugnant to prior antitrust decisions of this Court.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS EXPANDS ROBINSON-PATMAN LIABILITY IN DIRECT CONTRAVENTION OF ANTITRUST PRINCIPLES ESTABLISHED BY THIS COURT

In the decision below, the court of appeals held that a manufacturer that sells a product at the same price to all competing wholesalers may be liable under the Robinson-Patman Act to a direct-purchasing retailer if the discount granted at the wholesaler level is not found to be "cost-based" and a wholesaler passes on all or a portion of that discount to retail customers that compete with the direct-purchasing retailer. 842 F.2d at 1038. Such a result is unprecedented; all prior court of appeals decisions had confirmed the absolute right of a manufacturer to charge wholesalers lower prices than retailers because they operate at different levels of trade.[3]

3 *See, e.g., White Indus.* v. *Cessna Aircraft Co.*, 845 F.2d 1497 (8th Cir.), *cert. denied*, 109 S. Ct. 146 (1988); *Dart Indus.* v. *Plunkett Co.*, 704 F.2d 496, 499-500 (10th Cir. 1983); *Edward J. Sweeney & Sons, Inc.* v. *Texaco Inc.*, 637 F.2d 105, 120-22 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

The Robinson-Patman Act is extended beyond its legitimate scope if liability is imposed upon a manufacturer for price disparities that are attributable only to the intervening pricing decisions of its distributors. If manufacturers were required to monitor such intervening pricing decisions—which is the practical effect of the Ninth Circuit's decision—it would threaten the independent pricing freedom of wholesalers in a way that is counter to this Court's long-standing condemnation of resale price maintenance. *See, e.g., 324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 342-43 (1987). This Court should not condone such a result.

As this Court has observed, the Robinson-Patman Act was designed to deter suppliers from charging different prices to customers at the same level of distribution.[4] *See Abbott Laboratories* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1, 12 (1976) (focus of Act on competition "at the same functional level"); *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 520 (1963) (purpose of Act "to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on an equal competitive footing so far as price is concerned"). It is possible for a violation to occur when the favored and disfavored purchasers do not actually compete; for example, when a supplier discriminates among wholesalers that do not compete with each other, but whose retail customers compete. *See Falls*

4 There is no danger that confining the Act to its intended scope will invite its circumvention by manufacturers or retailers controlling dummy wholesalers. In such a situation, the dummy wholesaler's customers could be deemed direct customers of the supplier. *See Purolator Prods., Inc.* v. *FTC*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968); *General Auto Supplies, Inc.* v. *FTC*, 346 F.2d 311 (7th Cir.), *cert. dismissed*, 382 U.S. 923 (1965). As the Seventh Circuit noted in *Purolator Products*, "If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then *he has no power by his own action to prevent an injury to competition.*" 352 F.2d at 883 (emphasis added, citation omitted).

City Industries v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983). Nevertheless, in such a situation the supplier has discriminated between purchasers at the same level of distribution.

Finally, as detailed in petitioner's brief, neither *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), nor *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), supports the decision below. In *Perkins*, the favored purchaser owned a direct competitor of the disfavored purchaser, and liability could therefore have been based on a discrimination at the same level of trade. 395 U.S. at 651 (Marshall, J., concurring in part and dissenting in part). In relevant part, *Morton Salt* involved a claim that *wholesalers* were disfavored buyers as against direct-account retail customers. Thus, there was no possibility, as here, that the harm to competition depended upon the intervening pricing decisions of wholesalers. Indeed, the Federal Trade Commission order approved in *Morton Salt* specifically permitted different pricing between wholesalers and retailers, provided the retailers were not charged *less* than the wholesalers. 334 U.S. at 51. The decision below turns that decision and the statute itself on its head. Quite simply, there is no supporting precedent in this Court for the decision below.

II. THE DECISION OF THE COURT OF APPEALS WILL DRASTICALLY LESSEN THE ABILITY OF MVMA MEMBERS TO ADOPT EFFICIENT DISTRIBUTION SYSTEMS

A. The Practical Consequences of the Decision Below Are Contrary to Basic Sherman Act Principles.

If the decision below is upheld, MVMA members may be subject to Robinson-Patman Act liability if an independent wholesaler opts to utilize part of a functional discount to undercut the manufacturer's price to retailers, and a jury later concludes that the wholesale discount was not totally cost-based. In order to avoid liability under this standard, the manufacturer must either: eliminate the functional discount entirely; reduce it to the point of confidence (if possible) that it cannot be underpriced by any wholesaler customer; or tailor it precisely to the

costs of each individual wholesaler customer. None of these alternatives is practical or acceptable.

The elimination or substantial reduction of functional discounts would discourage many wholesalers from agreeing to distribute motor vehicle service and repair parts. Motor vehicle manufacturers lack the ability to supply directly the thousands of retailers throughout the United States who now purchase parts through intermediaries. As a result, motor vehicle parts needed for repair and maintenance would be less widely distributed, leading to reduced retail competition and increased prices. Of special concern to MVMA, the result will inevitably be a loss of consumer good will which will hamper future motor vehicle sales.

The alternative of requiring manufacturers to monitor their wholesalers' costs is impossible. MVMA's members dealing through wholesalers would have to obtain data about each wholesaler's costs and pricing strategies. Even if this were possible without risking serious legal exposure under the Sherman Act, it would involve enormous administrative burdens that would reduce a manufacturer's ability to operate its business on a daily basis—particularly its basic business of selling motor vehicles. Moreover, once the manufacturer did obtain the requisite data, it would be subject to potential liability for discriminating among wholesalers if it failed to correlate the discount precisely to a particular wholesaler's costs and thereby competitively disadvantaged that wholesaler.[5]

Compliance with the Robinson-Patman Act, as envisioned by the Ninth Circuit, would lessen price competition and marketing efficiency. Wholesalers with the lowest costs, and thereby most able to resell at the lowest prices, would be the most likely

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5 Even if the manufacturer would eschew attempts at cost-based price differences, the problem of monitoring wholesalers' pricing strategies would remain. Indeed, it is not immediately apparent how a member of MVMA would be required to respond upon learning that a wholesaler reduced prices below those charged by the manufacturer to its direct retail accounts. What is certain is that substantial litigation will be required before the parameters of such a rule would be established.

to have their functional discounts drastically reduced. Surely the Robinson-Patman Act does not require the punishment of efficiency and vigorous price competition. Interpreting the Robinson-Patman Act in this manner undercuts the procompetitive purposes of the Sherman Act, in contravention of this Court's mandate that such interpretations are to be avoided. *See, e.g.*, *Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 80 n.13 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978); *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 74 (1953).

B. The Decision Below Threatens Legitimate Distribution Practices of Motor Vehicle Manufacturers.

The rule announced below threatens to result in a flood of litigation over fundamentally sound distribution practices that are vitally important to many of the country's largest manufacturers, including the members of MVMA. The rigidity of the Ninth Circuit rule ignores the commercial reality that neither wholesalers nor retailers are monolithic blocks of similarly-situated businesses.

This is particularly apparent with respect to the distribution of service and maintenance parts for motor vehicles, which are sold either directly or, in many cases, through distributors and sub-distributors to various categories of retailers, including automobile dealers, national and regional retail chains, independent retailers, and repair shops. MVMA members must be able to tailor their distribution systems for the vast number of parts involved as necessary to ensure the broadest possible availability of products to meet their warranty obligations, and otherwise to facilitate repairs and replacements throughout the life of a motor vehicle. This simply cannot be accomplished solely through direct sales to retailers.[6] For many MVMA members, wholesalers are essential to meet these diverse needs; and functional discounts are required to attract and retain wholesaler customers.[7] This is the only way to ensure that parts will rapidly reach the many thousands of customers to whom such parts would not otherwise be readily available for the servicing and repair of motor vehicles.

6 With respect to "crash" parts—fenders, bumpers and the like—automotive dealers themselves often function as wholesalers to body and collision shops. Since this broadens distribution of the manufacturer's motor vehicle parts, MVMA members must remain free to grant dealers an adequate functional discount to encourage them to supply their potential competitors. This efficient and procompetitive practice will also be imperiled by the decision below.

However, affirmation of the decision below may result in dual distribution being too hazardous legally for MVMA members, creating an unacceptable dilemma for manufacturers and negative consequences for consumers. On the one hand, eliminating sales to wholesalers would result in a drastic decrease in the number of retailers from which motor vehicle service and repair parts could be obtained, leading to reduced retail competition and higher retail prices. On the other hand, eliminating direct sales to retailers would isolate the motor vehicle manufacturer from its dealers,[8] depriving it of the ability to protect a major component of its competitiveness—the serviceability of its vehicles.

MVMA strongly believes that its members ought not be precluded from supplying their products in the manner they deem most efficient in the context of their individual businesses. *GTE Sylvania* and other recent Sherman Act decisions of this Court

7 It is simplistic to argue that market forces should usually prevent liability because a manufacturer would not find it profitable to sell to wholesalers at discounts great enough to enable them to undercut the manufacturer's prices to direct retailer accounts. A direct-distributing manufacturer uses wholesalers to reach different types of retailers—retailers to whom it is too expensive to sell directly, either because of their size, geographic location or peculiar business needs. The functional discount is primarily an incentive for the wholesaler to reach this wide variety of incremental retail outlets. Thus, the amount of the functional discount will only coincidentally be related to the manufacturer's theoretical cost of distributing directly to any particular retailer.

8 In truth, the option of eliminating direct supply relationships with motor vehicle dealers is not available to MVMA members, because the complex web of legal and commercial relationships between these motor vehicle manufacturers and their dealers precludes the use of independent intermediaries.

apply this very proposition.[9] Yet the decision of the court of appeals, if permitted to stand, would have that constraining effect. An effective parts distribution system is critical to the continued competitiveness of the motor vehicle industry, but the decision below threatens to make distribution of such products needlessly more expensive and inefficient. MVMA respectfully urges this Court to forestall this result by reversing the Ninth Circuit in this case.

9 *See Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 57-58 (1977) (courts should carefully examine competitive effects before condemning efficient distribution practices that are widely used). *See also Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515, 1520 (1988) ("market-freeing" effect of *GTE Sylvania* should not be frustrated by legal rules); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984) ("management's exercise of its independent business judgment" regarding distribution matters should not be interfered with except in the face of solid evidence of illegality).

CONCLUSION

For the reasons set forth above, Motor Vehicle Manufacturers Association of the United States, Inc. urges that the decision of the Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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August 3, 1989

MOTION FILED
AUG 7 1988

(19)

No. 87-2048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TEXACO, INC.,
Petitioner,

v.

HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Petroleum Marketers Association of America ("PMAA") respectfully moves this Court for leave to file the attached *amicus curiae* brief in support of the brief filed by Texaco in this case, No. 87-2048. The consent of the attorney for petitioner has been obtained, however, counsel for the respondents refused to consent to the PMAA's filing of a brief *amicus curiae*.[1]

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[1] This Court previously granted a motion by the PMAA to file an *amicus* brief in support of Texaco's petition for certiorari, over respondents' objection.

The applicant, PMAA, is a federation of 43 State and regional trade associations representing over ten thousand petroleum marketers. Together, PMAA members market approximately 50 percent of the gasoline and 75 percent of the home heating oil sold in America. PMAA members are comprised primarily of jobbers and other wholesale distributors of refined petroleum products and chain retailers that market motor fuels through service station outlets. The overwhelming majority of the Nation's wholesale distributors belong to the PMAA's federated State and regional associations.

The critically important issue raised by Texaco's petition in this case is whether a claim of unlawful price discrimination under the Robinson-Patman Act[2] can be maintained by retailers against a manufacturer of petroleum products because the manufacturer sells to its wholesalers at a lower price than it charges retailers. According to the lower court, the disparities in prices traditionally charged to petroleum wholesalers and retailers are *prima facie* evidence of illegal price discrimination if they are not deemed justified by the wholesaler's costs and if some portion of the wholesaler's price advantage is passed through to its retail customers. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1039 (9th Cir. 1988). In short, refiners such as Texaco will be subjected to a substantially increased risk of antitrust liability whenever functional discounts are offered to wholesalers, thus threatening the existence of the discounts themselves.

Wholesale distributors, of course, resell the products they purchase to independent retailers and they cannot perform their marketing function if they are required to purchase petroleum products at the same prices that are offered to their retailer customers and their customers' competitors. Thus, while the instant controversy concerns a manufacturer and a

[2] 15 U.S.C. Section 13(a).

retailer, its ultimate resolution will most profoundly impact on the ability of wholesale distributors to remain a competitive force in the petroleum industry.[3]

This Court will hear the views of the petitioner, a manufacturer of petroleum products, and the respondents, who are retail service station dealers. The PMAA seeks leave to file the accompanying *amicus curiae* brief in order to provide the perspective of the one group, wholesale distributors, who will be most profoundly affected if the decision below is allowed to stand.

CONCLUSION

The PMAA's motion for leave to file an *amicus curiae* brief should be granted.

Respectfully submitted,

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[3] If the decision is allowed to stand, manufacturers of petroleum products will adapt to the lower court's ruling by adjusting their pricing policies in one of the following ways: (1) by eliminating wholesale discounts; (2) by prohibiting wholesale distributors from passing through all or a portion of the discount; or (3) by regulating the level of passthrough based upon calculations as to the "value" of the distributional services performed by the wholesale customer. Any one of these alternatives would have extraordinary consequences for wholesale distributors and the competition that they bring to the petroleum industry.

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BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

The Petroleum Marketers Association of America (PMAA) respectfully submits this brief *amicus curiae* in support of the brief filed by Texaco, Inc. in this case.

INTEREST OF *AMICUS CURIAE*

The PMAA is a federation of 43 State and regional trade associations representing over ten thousand small business petroleum marketers.[1] Together, PMAA members market ap-

[1] A list of the constituent State and regional trade associations that comprise the PMAA is set forth in the Appendix hereto.

proximately 50 percent of the gasoline and 75 percent of the home heating oil sold in America. In addition, they supply roughly two-thirds of the Nation's retail motor fuel facilities,[2] approximately three-quarters of which are operated by independent retailers. PMAA members are comprised primarily of jobbers and other wholesale distributors of refined petroleum products as well as chain retailers that market motor fuels through service station outlets. Historically, refiners have chosen to market a large percentage of their products through independent marketers because the Nation's vast petroleum supply network requires capital and manpower expenditures greater than the resources of even the largest corporate entity.

The PMAA's interest in this case is direct and substantial. At issue is a decision of the Ninth Circuit Court of Appeals[3] that impacts on the ability of refiners and other suppliers of petroleum products to offer functional discounts to their wholesale distributors. Wholesale distributors, of course, resell the products they purchase to independent retailers, a function that cannot be performed if they are required to purchase petroleum at the same prices that are offered to their customers and to their customers' competitors. Without functional discounts, wholesalers would be unable to remain a competitive force in the petroleum industry.

The Ninth Circuit's decision in this case risks the elimination of functional discounts in dual distribution areas, where

[2] Independent marketers own or lease over 58,000 retail facilities nationwide and store fuel at over 10,000 additional "bulk plants." PMAA's 1986 member survey discloses that its members supplied 97,871 of America's approximately 150,000 retail motor fuel distribution outlets (e.g., gasoline stations, truck stops, convenience stores, etc.). Their 230,000 employees service this network with roughly 100,000 vehicles and they bear the credit costs and risks of approximaely $13 billion in credit card sales that they and their dealers make to the American motoring public annually.

[3] *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988).

refiners' direct sales to retail dealers overlap with those of their branded distributors. These dual distribution or overlap areas are becoming substantially more prevalent in the petroleum industry, and they exhibit an intense price rivalry. While at one time, refiners' direct marketing operations were confined to more densely populated areas, with wholesalers occupying a niche in less concentrated areas where direct marketing is generally not cost-effective, demographic shifts have altered this pattern significantly. The expansion of direct marketing operations by refiner-suppliers has mirrored the expansion of metropolitan areas into what was once exclusively wholesaler territory, thus placing refiners in competition with their branded distributors. If functional discounts are eliminated in these areas, wholesalers would be unable to supply their customers at prices that are competitive with the prices charged by refiners to direct buying retailers.

For the reasons that follow, the Ninth Circuit's decision risks the elimination of functional or wholesale discounts and the establishment of a system of refiner price regulation that can only lead to higher prices and less competition at the wholesale and retail levels.

ARGUMENT

The Robinson-Patman Act was enacted by Congress at the behest of certain retailers who feared the competitive advantages that chain stores and other big buyers could secure solely because they purchased in large quantities. As is clear from the legislative history of the Act, the concern of Congress focused on the ability of large buyers to exact discounts from their suppliers because of their quantity purchasing ability, and a perceived harm to competition from the elimination of other buyers who were unable to secure the same advantage. *F.T.C. v. Morton Salt*, 334 U.S. 37, 43 (1948); *Falls City*

Industries Inc. v. Vanco Beverages Inc., 460 U.S. 428, 436 (1983); Rowe, *Price Discrimination Under the Robinson-Patman Act* 3-23 (1962).

Consistent with the purposes of the Act, this Court recognized an inference of harm to competition in circumstances representing the paradigm setting envisioned by Congress, that is, where a substantial price disparity exists among competing purchasers operating at the same level of trade and where the price differences are unrelated to the functions they perform. As first recognized in *Morton Salt*, and later applied in *Falls City*, the so-called "self-evident" inference of competitive injury is derived from the lack of any apparent justification for the price difference other than the favoritism that was the focus of the Act.

At issue in this case is the application of the *Morton Salt* inference in an entirely different setting and one that does not easily lend itself to mechanical applications of antitrust principles. Here, antitrust injury was inferred from price disparities existing among purchasers at different levels of trade, where the price differences resulted from the functional discounts normally given to petroleum wholesalers who supply retail service station dealers. The application of the inference to functional discounts, which have heretofore maintained an uncertain status in the law,[4] has never been considered by this Court.

As will be developed more fully below, harm to competition is not easily inferred from circumstances where an apparent justification exists for the price difference, such as where it reflects the different functions performed by wholesalers and retailers at different levels of trade. Where, as here,

[4] See, Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. & Com. L. Rev. 543, 543-44 (1976). *See also, e.g., Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65-74 (1953).

favoritism is not self-evident from the price differences at issue, the entire factual context should be examined to determine whether the requisite harm to competition is present. Yet the Ninth Circuit failed to credibly examine the contextual circumstances, focusing instead on whether the functional discount is justified by the costs associated with the wholesaler's function. Rather than examining direct evidence of harm to competition, it sanctioned an inference of competitive injury when wholesalers pass through their discounts to retail customers and where the discount is deemed to exceed the wholesaler's costs.

This mechanical extension of the *Morton Salt* inference to circumstances for which it was not originally intended has led the Ninth Circuit to a result that is at odds with the purposes of the Robinson-Patman Act. By imposing antitrust liability on suppliers for the independent pricing determinations of their wholesale distributors, the lower court has invited the establishment of a cumbersome cost-based pricing system that is unresponsive to a free play of competitive forces. That the imposition of such a system is not justified in the circumstances of this case is apparent from the anticompetitive impact it will have on the petroleum industry.

I. Functional Discounts Are Part of The Normal Functioning Of A Highly Competitive Industry

It has long been a hallmark of the petroleum industry that businesses operating at higher functional levels are subject to pricing policies that are significantly different from those that suppliers implement further down the chain of distribution. That wholesalers receive price advantages not generally available to retail service station dealers is both necessary to the continued existence of wholesalers and to the maintenance of

a distribution system that is characterized by intense competition at the wholesale and retail levels.

Wholesale distributors are generally supplied with petroleum products by large refiners and they resell the products to independent service station dealers. For the most part, they are engaged in providing services that would normally be provided by their refiner-suppliers had the supplier opted in favor of a direct marketing operation. In many cases, these services include the maintenance of inventories, product delivery, product promotion, assisting retail dealers in becoming effective marketers, investing in equipment and making service station properties available to retail dealers. The costs associated with these services, of course, are borne by the distributor and they reduce the capital burdens of the supplier.

While the services performed by wholesalers differ from distributor to distributor, from customer to customer and from market to market, all wholesalers are confronted with a substantial entrepreneurial risk. Such risks are assumed by wholesalers when they extend credit to their customers, when they incur debt and when they contract to provide a constant source of supply to their customers irrespective of market conditions. Moreover, because their contracts with suppliers require minimum purchases of motor fuels and other petroleum products, wholesalers also assume the risk that their sales volumes will be sufficient to cover the quantities of products they are obliged to purchase. The assumption of these risks by wholesalers normally results in a substantial lessening of the market risks assumed by suppliers — a fact not lost on such suppliers when they offer functional discounts.

In areas where they market, wholesale distributors can exist only when the prices at which they purchase petroleum products enable them to resell at a profit, after incurring the costs associated with the distributional services they perform,

the investments they make and the risks they assume. In short, wholesalers could not exist without functional discounts; they could not remain in business if they were required to purchase petroleum products at the same prices that are offered to the independent service station dealers whom they are in the business of supplying.

Petroleum suppliers are also required to offer functional discounts if they are to maintain an effective market presence in areas where it is not cost-effective to market directly, or in direct marketing areas, where capital investments are to be minimized. By offering functional discounts to attract wholesale distributors, a major refiner can maintain its brand in a particular local market without incurring the expenses of investing its capital in marketing facilities.

The synergies created by this relationship among petroleum suppliers and wholesalers, built upon the existence of functional discounts, can be observed in virtually any market setting. In those less concentrated areas where it is not cost-effective for refiners to maintain direct marketing operations, wholesale distributors bring efficiencies and competition that would not otherwise be present. As the U.S. Department of Energy (''DOE'') observed after a review of refiner marketing strategies, ''. . . jobbers are more efficient and better positioned to distribute in more widely disbursed areas where distribution costs tend to be relatively high for refiners.''[5] And in so-called ''dual distribution areas,'' where sales by refiners overlap with those of their branded distributors, wholesalers provide an additional presence in the market and additional competition. As the DOE concluded, ''these overlap areas exhibit intense price rivalry . . . [as] a result, . . . t[illegible] competitive

[5] U.S. Department of Energy, Deregulated Gasoline Marketing, *Consequences for Competition, Competitors, and Consumers*, DOE/CP-0007 (1984) at 43.

process is working vigorously in these areas with the consumer the utilimate beneficiary."[6]

Thus, functional discounts are part of the normal functioning of a highly competitive industry. They are pervasive; they exist in virtually every market setting and the only inference that may be drawn from the disparate prices charged to wholesalers and retailers is that the system is functioning normally. As shown below, these price differences do not give rise to an inference of illegal price discrimination; in such circumstances, illegal price discrimination must be proven with direct evidence of harm to competition.

II. Illegal Price Discrimination Cannot Be Inferred From The Disparate Prices Suppliers Charge Wholesalers and Retailers

A. Under the Robinson-Patman Act, Illegal Price Discrimination May Be Inferred From Substantial Price Disparities Only When The Customers Subject To Such Price Differences Are Not Functionally Different

The Robinson-Patman Act was aimed at protecting small retail businesses against favoritism toward their larger competitors and its objective was the elimination of the competitive advantage a large buyer could secure solely because of its quantity purchasing ability. *F.T.C. v. Morton Salt*, 334 U.S. at 43. The focus of the Act was the quantity discount to large buyers and the inability of other buyers, at the same level of distribution, to secure the same discount so long as they performed the same function.

In *Morton Salt*, for example, this Court was confronted with a salt manufacturer's discount pricing system under which only

[6] *Id.* at 126 n. 2.

the five largest retail grocery chains in the country were able to buy enough salt to qualify for the manufacturer's most lucrative discount. This was the classic Robinson-Patman case aimed at the very type of price discrimination the Act was designed to prevent, namely, a system that discriminates among competing buyers simply by virtue of their size. Because there were no functional differences among the favored and disfavored buyers in *Morton Salt*, it was obvious to this Court that the longstanding and substantial price disparity was proof of the evil that Robinson-Patman was aimed at preventing. Hence the so-called "self-evident" inference of competitive injury.[7]

Where there are no functional differences between competing purchasers, substantial price disparities give rise to an inference of illegal price discrimination because there is no apparent justification for the price difference other than the favoritism that prompted Congress to enact Robinson-Patman. Thus, under the doctrine set forth in *Morton Salt*, the burden rests with the manufacturer to justify the discount "based on his actual savings and costs." *Morton Salt*, 334 U.S. at 48.

Where there are functional differences between buyers, however, price differences are to be expected. In the petroleum industry, for example, price disparities among wholesalers and retail dealers are part of the normal functioning of the system; a rationale for the price difference is apparent from the different levels of trade at which the wholesalers and retailers operate. There is nothing "obvious" or "self-evident" from which to infer that the price disparities result from the favoritism that prompted Congress to enact

[7] In the circumstances of *Morton Salt*, this Court found a basis for the inference of illegal price discrimination in "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." 334 U.S. at 46-47.

Robinson-Patman. If anything, the inference should be just the opposite, that is, an inference that price disparities between non-competing wholesalers and retailers are deemed justified on a functional basis in the absence of direct evidence of harm to competition.

Unlike *Morton Salt* and *Falls City*, the price discrimination at issue in this case was not the result of quantity or regional discounts applied to purchasers at the same level of trade. Nor was it rooted in any favoritism for an elite group of Texaco's largest customers; indeed, there is no dispute that the wholesale discounts at issue were made available to all wholesalers, irrespective of size. Yet the Court below treated the price disparities as an anomaly justifying an inference of illegal price discrimination, rather than as a normal attribute of petroleum distribution.

The Ninth Circuit's construction of *Morton Salt*, and its application of the "self-evident inference" to the circumstances presented here, is not a construction that this Court has ever adopted. While the court below purported to root its application in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), its reliance on *Perkins* is misplaced. It cited *Perkins* for the proposition that substantial price disparities between wholesalers and retailers of petroleum products give rise to the same inference of illegal price discrimination as do price disparities that exist between purchasers at the same level of trade, so long as the wholesaler passes on a portion of its discount to its retail customers. Yet in *Perkins* the favored and disfavored buyers were dual distributors operating at both the wholesale and retail levels.[8] Functionally, there was no difference between the favored and disfavored buyers; both of them purchased gasoline from Standard and resold the product at their own directly operated stations.

[8] The disfavored buyer, Perkins, "was both a wholesaler, operating storage plants and trucking equipment, and a retailer through his own Perkins stations." 395 U.S. at 644. The favored buyer, Signal Oil & Gas Co., was the parent of vertically integrated subsidiaries, one of which operated a chain of retail service stations. *Id.* at 645. In essence, this Court found that Signal, and not its retail subsidiary, was the "customer" that competed with Perkins. *Id.* at 647.

Unlike the situation present here, *Perkins* has all of the elements of a paradigmatic Robinson-Patman case. Because Signal furnished Standard with part of its vital supply of crude petroleum, it was able to insist upon a lower price than was offered to its competitor, Perkins, who performed the same marketing functions. *Id.* at 647. The root of the controversy was the favoritism shown to one buyer over its competitor based upon factors that are unrelated to the functions they performed. As was the case in *Morton Salt*, illegal price discrimination was "self-evident" and inferred from the price disparities that resulted from the favoritism shown to Signal.

Thus, it is only when no apparent justification for the price disparity exists that harm to competition may be inferred. Where, as here, the disparate prices are charged to customers at different levels of trade, the only "self-evident" inference to be drawn is that the system is functioning in a rational manner; a violation of § 2(a) can be established, therefore, solely through direct evidence of harm to competition.

B. The Lower Court Erred In Extending The Reach Of The Self-Evident Inference To Functionally Different Purchasers Through A Cost-Based Approach

While the Ninth Circuit acknowledged that wholesale or functional discounts offered equally to all wholesale distributors will not normally constitute illegal price discrimination, it held that injury to competition is "self-evident" in the *Morton Salt* sense whenever the price differentials between wholesale and retail customers: (1) exceed "the value of the services [a wholesale distributor] perform[s];" and (2) the discount is

passed through, in whole or in part, to the wholesaler's retail customers. 842 F.2d at 1039. This extension of the "self-evident" inference to sales occurring at different levels of trade has no solid grounding in antitrust law and is fraught with potentially disastrous practical consequences for wholesalers.

The rationale for the lower court's extension of the inference is set forth in its opinion:

> "Where, as here, the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function, the seller cannot claim immunity from Robinson-Patman liability. In such situations, the connection between the seller's price discrimination and the adverse effect on competition is *obvious and foreseeable* and a plaintiff may assert a cause of action against the seller even though he and the favored customer operate at different market levels. *See Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969); *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), rev'd on other grounds, 340 U.S. 231 (1951)." (emphasis added)

842 F.2d at 1040.

For the reasons stated below, the logic of this holding is seriously flawed; when viewed from a market perspective, it is not only counterintuitive, but the rules that flow naturally from it are unworkable in the petroleum industry.

The lower court, of course, is correct when it states that a seller cannot always claim immunity from Robinson-Patman liability for the downstream effects of its pricing policies. It is quite wrong, however, to state that harm to competition is "obvious and foreseeable" whenever the functional discount granted a wholesaler exceeds the costs of its function. To begin with, functional discounts virtually always exceed the cost of

a wholesaler's function in dual distribution areas; were it not so, wholesalers would find it exceedingly difficult to earn a profit.[9] Moreover, it is not the size of the discount that impacts competition, it is the amount of it that is passed through in a wholesaler's price to retailers. Whether a wholesaler will pass through a portion of its discount, however, and the amount of the passthrough, are not often "obvious" to suppliers. And whenever a wholesaler passes through a portion of its discount — a portion that could as easily be applied to earnings — it is usually animated by the competitive forces of the marketplace. To assume otherwise would be to attribute to the wholesaler a desire to forego profits, without market justification.

While functional discounts may not always enhance competition, it would be wrong to assume — as the lower court did here — that the "obvious and foreseeable" effect of such passthroughs is anticompetitive. And it would be just as wrong to assume that the natural and foreseeable consequence of the Ninth Circuit's decision — supplier price regulation — is workable within the petroleum industry or that it will further the objectives of the Robinson-Patman Act.

Under the court of appeals decision, refiners risk liability whenever their wholesale customers decide to pass on a portion of a wholesale discount to retailers. Thus, any refiner offering wholesale discounts risks running afoul of § 2(a) of the Robinson-Patman Act unless it: (1) stops offering wholesale discounts; (2) prohibits its wholesale customers from passing through all or a portion of the discount; or (3) regulates the

[9] The wholesale discount is, in effect, the wholesaler's gross margin and it contains some element of profit. If wholesale distributors were required to purchase petroleum products at the same prices that are available to direct-buying retail dealers, with an allowance only for the precise amount of the wholesaler's costs, they would either have to forego a profit or resell the product to their own retail dealer customers at uncompetitive prices.

level of passthrough based upon precise calculations as to the "value" of the distributional services performed by the wholesaler. Any one of these alternatives would have extraordinary consequences for the petroleum industry.

The consequences for wholesale distributors of losing their discounts are obvious; if they purchase petroleum products at the same prices that are available to direct-buying retail dealers, they would be unable to resell the product to their own retail dealer customers at competitive prices. The same would be true if they were prohibited from passing through any portion of their discounts to retail customers. Were that the case, there would be no incentive to practice the efficiencies that make such passthroughs possible.[10] Moreover, to the extent that a wholesale distributor and its refiner-supplier cooperate in a scheme to regulate passthroughs, they would be exposed to resale price maintenance claims under Section 1 of the Sherman Act.[11]

Finally, no refiner-supplier can be expected to incur the massive administrative burden associated with justifying each functional discount on a cost-savings basis. The refiner-supplier would be required to know the number of days the product was stored by the distributor prior to resale, whether credit was extended upon resale and the credit risk, whether the wholesaler employed a salesman in the transaction, the costs associated with delivery of the product by the wholesale distributor to its own customer, whether promotional costs were incurred and the *pro rata* portion of all of the other fixed and variable costs associated with marketing a certain volume of product in a particular market. It would also be required

[10] In many cases, the incentive animating wholesalers to achieve efficiencies and market at the lowest practical price is to increase market share.

[11] 15 U.S.C. § 1. The longstanding recognition of price maintenance as a Sherman Act violation is reflected in this Court's opinion in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960).

to place a "value" on certain intangible services provided by the wholesaler, such as the assistance provided retail dealers in becoming effective marketers. These costs vary from distributor to distributor and from time to time and are impossible to calculate with any degree of precision.[12]

The cost-based approach adopted by the court below, therefore, does not enhance the objectives of the Robinson-Patman Act. As is apparent from its application here, it is capable of supporting an unjustified inference of illegal price discrimination and a finding of Robinson-Patman liability in the absence of direct evidence of harm to competition. If it becomes an established precedent, moreover, it will signal the demise of at least those wholesale distributors in overlap areas, whose presence in the distribution system can no longer be justified if refiner-suppliers are exposed to antitrust liability for the independent pricing determinations of their wholesale distributors. As such, it can only lead to higher prices and less competition at the wholesale and retail levels.

III. Reliance Upon the "Self-Evident" Inference Was Especially Inappropriate In This Case Because Of The Absence Of Direct Evidence Of Harm To Competition.

In considering the requisite harm to competition, the lower court relied almost exclusively on the "self-evident" inference to support its holding. What the Ninth Circuit characterized as "considerable specific evidence" of an adverse effect on competition[13] was comprised of a few displaced sales and lost

[12] In determining that the discounts involved here were not cost-based, the Ninth Circuit cited the district court's observation that "Texaco made 'no serious attempt' to provide a quantitative justification for its functional discount, instead 'merely identifying some of the functions' that Dompier and Gull were said to have performed." 842 F.2d at 1039.

[13] 842 F.2d at 1041.

profits by some of the plaintiffs, hardly the sort of evidence that would establish an appreciable impact on the market. 842 F.2d at 1041 and 1042-43. There was no real market analysis nor any consideration of whether the major factors driving the Spokane market were the cause of plaintiffs' apparent misfortune. Indeed, there was no discussion by the lower court of whether competition in the Spokane market was in fact thriving.[14]

In reality, the direct evidence relied upon by the lower court as a supplement to the "self-evident" inference focused exclusively on harm to the plaintiffs. It focused on a infinitesimal segment of the market and it attempted to justify its narrow focus with the maxim that "injury to competitors may be probative of harm to competition." 842 F.2d at 1040. Yet injury to competitors alone — especially when such competitors comprise a mere handful of those that exist in the market — is not enough to establish a *prima facie* case of injury to competition.[15] While Section 2(a) is satisfied by a showing of a reasonable possibility that a price difference *may* harm competition, "that principle does not justify abdication of the duty to consider evidence that a 'reasonable possibility' of harm does not, in fact, exist in the particular industry." *Boise*

[14] As Texaco points out at p. 5 of its petition for certiorari, "Texaco was just one of many gasoline sellers in Spokane and, concededly, competitive intensity increased over the 1972-81 period. (ER 165, 178, 236-41, 288-89, 295-96, 334). Plaintiffs acknowledged that their businesses were injured by, among other things, entrance into the market of new, high-volume self-serve or mini-serve stations (ER 186B, 230, 303-08), the advent of higher mileage-per-gallon automobiles (ER 402), and entrance into the market of well-known entities, such as Sears or Midas Mufflers (ER 403A-03B)."

[15] This Court's admonition in *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) that the antitrust laws were enacted for "the protection of competition, not competitors," was dismissed by the court below as an "oft-quoted chestnut" that is regularly misconstrued by antitrust defendants. 842 F.2d at 1040.

Cascade Corporation v. FTC, 837 F.2d 1127, 1146 (D.C. Cir. 1988).

In short, there was no consideration by the lower court of whether the lower prices engendered by the functional discounts worked their way to consumers and whether, on the whole, they had a positive effect on competition in the marketplace. It appears that the lower court was concerned solely with enhancing certain fairness goals, which it considered violated when competing retailers were charged different prices for goods of like grade and quality. But by equating harm to competition with harm to the plaintiffs, and by ignoring the competitive condition of the market in which the alleged violations were said to have occurred, the lower court fashioned what is in effect a *per se* rule of illegality. Harm to competition is conclusively presumed irrespective of whether the impact of the price disparities at issue are of a sort to be regulated by the Robinson-Patman Act. It is precisely this type of doctrinaire application that places Robinson-Patman "in hopeless and complete conflict with other antitrust laws," *Boise Cascade Corp. v. F.T.C.*, 837 F.2d at 1149 (Williams, Cir. J. concurring), a result that cannot be countenanced by this Court in light of its repeated admonitions that such conflicts are to be avoided.

CONCLUSION

The decision of the Ninth Circuit in this case should be reversed.

Respectfully submitted,

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August 4, 1989

APPENDIX

Amicus Curiae, Petroleum Marketers Association of America, is a non-profit trade association comprised of the following associations:

Alabama Oilmen's Association
Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Empire State Petroleum Association
Florida Petroleum Marketers Association
Fuel Merchants Association of New Jersey
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Independent Connecticut Petroleum Association
Independent Oilmen's Association of New England
Indiana Oil Marketers Association, Inc.
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Maine Oil Dealers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Mississippi Petroleum Marketers Association
Missouri Oil Jobbers Association
Montana Petroleum Marketers Association
Nebraska Petroleum Marketers, Inc.
Nevada Petroleum Marketers Association
New Mexico Petroleum Marketers Association
North Carolina Petroleum Marketers Association
Northwest Petroleum Association
Ohio Petroleum Marketers Association

Oklahoma Oil Marketers Association
Oregon Petroleum Marketers Association
Pennsylvania Petroleum Association, Inc.
Petroleum Marketers Association of Wisconsin, Inc.
Petroleum Marketers of Iowa
South Carolina Petroleum Marketers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Texas Oil Marketers Association
Virginia Petroleum Jobbers Association
Washington Oil Marketers Association
West Virginia Petroleum Marketers Association
Western Petroleum Marketers Association
Wyoming Petroleum Marketers Association

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO INC.,

Petitioner,

v.

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL COALITION OF PETROLEUM RETAILERS AS *AMICUS CURIAE* IN SUPPORT OF THE POSITION OF RESPONDENT

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MOTION OF THE NATIONAL COALITION OF PETROLEUM RETAILERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Coalition of Petroleum Retailers ("NCPR") hereby seeks leave pursuant to Supreme Court Rule 36.3 to file the attached brief as *amicus curiae* in support of Respondents, Ricky Hasbrouck, d/b/a Rick's Texaco, et al. The consent of the attorney for respondents has been obtained. However, attorney for petitioner has refused to consent to the filing of a Brief *Amicus Curiae* by NCPR.

The National Coalition of Petroleum Retailers ("NCPR") is a coalition of independent gasoline retailer trade associations representing over 20,000 in-

dependent service stations in the states of Georgia, Pennsylvania, New Jersey, New York, Connecticut and Florida. NCPR is concerned with preserving the viability of independent gasoline retailers in the areas in which they serve and indeed, in the entire United States. It is seeking to protect and defend the existence of independent gasoline retailers by working primarily in the legislative and legal areas. In that regard, NCPR sponsors appropriate legislation both at a state and federal level and supports lawsuits where the interests of its members are affected. In addition, the constituent associations work directly with representatives of refiners and wholesale distributors (hereinafter "jobbers") in dealing with the individual problems of their members.

One of the primary concerns of NCPR is the decline in the number of independent gasoline dealers in the past decade from approximately 200,000 to approximately 100,000. In the meantime, the role of the jobber has increased sharply.

One of the significant factors in the decline of independent retailers has been the substantial discounts given by their refiner suppliers to jobbers, often selling the same brand of gasoline through their own retail outlets. This places the independent dealer, who is attempting to compete with the jobber dealers, at a significant price disadvantage which adversely affects competition in the relevant market.

Dealer groups have been attempting for the past six or seven years to alert legislative bodies to these problems. The independent dealer depends on the provisions of the Robinson-Patman Act for protection against the anticompetitive effects of the type of price discriminations which are the core of this case. Its

outcome, therefore, will substantially and directly affect the independent gasoline dealers represented by NCPR. As such, their interest is direct and substantial.

The NCPR's motion for leave to file an *amicus curiae* brief should be granted.

Respectfully submitted,

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Dated: September 6, 1989

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF OF THE NATIONAL COALITION OF PETROLEUM RETAILERS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

This brief is submitted on behalf of the National Coalition of Petroleum Retailers ("NCPR") as *amicus curiae* in support of respondent.

STATEMENT OF INTEREST

NCPR is a coalition of independent gasoline retailer trade associations representing over 20,000 independent dealers in the states of Georgia, Pennsylvania, New Jersey, New York, Connecticut and Florida. NCPR is concerned with preserving the viability of

independent gasoline retailers in the areas in which they serve and indeed, in the entire United States. It is seeking to protect and defend the existence of independent gasoline retailers by working primarily in the legislative and legal areas. In that regard, NCPR sponsors appropriate legislation both at a state and federal level and supports lawsuits where the interests of its members are affected. In addition, the constituent associations work directly with representatives of refiners and wholesale distributors (hereinafter "jobbers") in dealing with the individual problems of their members.

One of the primary concerns of NCPR is the decline in the number of independent gasoline dealers in the past decade from approximately 200,000 to approximately 100,000. In the meantime, the role of the jobber has increased sharply. See Brief for *Amicus Curiae* Petroleum Marketers Association of America, at 2 n.2.

The market in this case has aspects which make the practices involved particularly pernicious to NCPR and its members. First, the market is strongly price-sensitive, and small price advantages, such as a penny a gallon at retail, can cause significant customer swings. Second, the independent branded retailer cannot shift suppliers to take advantage of a cheaper supply because of its franchise relationship with the refiner-supplier who sells it gasoline at what is known as the Dealers' Tankwagon ("DTW") price. This same refiner-supplier may also, however, be competing with the independent branded retailer through its own retail stations.[1] In addition, the same refiner-supplier

[1] A side effect of this structure is that the refiner-supplier, because of its presence in the retail market, is fully knowledgeable as to the effects of its wholesale pricing and distribution methods. It is naive, therefore, to assert that Texaco was not knowledgeable as to pricing occurring in retail markets.

may be selling to a jobber who also operates retail stations in competition with the same independent branded retailers. A common complaint of independent branded retailers in such markets is that the jobber-dealer, because of the jobber discount, is able to sell gasoline at retail at a price less than the DTW price to the independent branded dealer. The result is, of course, that the jobber discount places the independent branded dealer at a severe competitive disadvantage. Indeed, NCPR considers the jobber discount to be a significant factor in the loss of approximately 10,000 independent dealer stations per year for the past ten years. Such a loss must adversely affect competition by reducing the options previously available to motorists.

Dealer groups have been attempting for the past six or seven years to alert legislative bodies to these problems. However, the most significant dealer legislation in the past decade—the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.*—did not address this problem because the Congress considered it to be primarily a matter within the purview of the Robinson-Patman Act, 15 U.S.C. § 13 *et seq.*[2] (hereinafter, "Act"). The independent dealer, therefore, must look to the Act for protection against the anticompetitive effects of the type of price discrimination which is the core of this case. Its outcome,

[2] *See* Petroleum Marketing Practices: Hearing on H.R. 130, H.R. 274, H.R. 468, H.R. 511, and H.R. 3478, 95th Cong., 1st Sess. at 283 *et seq.* (1977).

therefore, will substantially and directly affect the independent gasoline dealers represented by NCPR. As such, NCPR's interest is direct and substantial.

SUMMARY OF ARGUMENT

The findings of the lower courts and the jury make clear that the price discriminations involved in this case are trade discounts, not functional discounts, and, as such, violate the Act. Utilizing traditional functional discount analysis, the price discriminations also violate the Act because the jobbers in this case performed no "functions" other than delivery to their retail outlets for which they were separately compensated by Texaco. The record below further demonstrates that plaintiffs (collectively hereinafter "Hasbrouck") repeatedly informed Texaco that the trade discounts were passed on to competing retailers who could then sell gas at or below the DTW price Texaco charged Hasbrouck. Consequently, Texaco knowingly discriminated in price between competing retailers over a sustained period of time and clearly denied Hasbrouck the equality of competitive opportunity which the Act was expressly designed to afford.

Texaco now is seeking, despite the record below, the judicial creation of an absolute defense for "functional" and "trade" discounts which Congress refused to create. It should not be allowed to succeed.

The decisions below strike the balance required by the Act between permitting legitimate functional discounts reflecting cost saving services provided by favored jobbers and forbidding unjustified price discrimination through trade discounts unrelated to any legitimate cost savings provided by the favored jobbers.

Given the facts of this case; the nature of competition in the gasoline marketing business; the express language of the Act; the failure of Texaco to assert defenses available to it or to negate Hasbrouck's evidence of causation; and the absence of evidence showing the favored jobbers performed any functions justifying the discount; this Court should affirm the decision of the Ninth Circuit.

ARGUMENT

I. The Decision Below Correctly Refuses To Create A Defense Based on Functional Or Trade Discounts To A Robinson-Patman Discrimination When Congress Expressly Refused To Do So, And Where The Discount Is Knowingly Given, Not Cost-Justified And Injures Competition.

The lower courts have determined that the jobber discounts extended by defendant Texaco, Inc. ("Texaco") in this case have injured competition, that the discounts were not justified by cost savings and that the discounts were not compensating the jobber for performing a function which otherwise would have been performed by the supplier. The primary function performed by the jobber was to transport gasoline from the tank yard of the supplier to its own stations. For this function, however, the jobbers received a special hauling allowance in addition to the jobber discount.

The lower courts and a jury found that Texaco knowingly gave, over a sustained period of time, trade discounts to dual distributing jobbers in the Spokane,

Washington gasoline market.[3] The favored jobbers were supplied gasoline at prices ranging from 2.5 to 5.7 cents per gallon below the price charged Hasbrouck over several years. The findings by the jury, the district court, and court of appeals include that: (1) there was no relationship between the functions performed by the favored jobbers and the amount of the discount; (2) at least one of the favored jobbers performed no functions justifying the discount but was simply engaged in "paper transactions" for Texaco; (3) one of the jobbers was a dual distributor and Texaco delivered product directly to the favored jobber's customers; and (4) Texaco made no serious attempt to provide a quantitative justification for its discount to both of the favored jobbers. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1039; 634 F.Supp. 34, 38. (E.D. Wash. 1985).[4]

Therefore, this case comes to this Court on a record that Texaco was not engaged in granting a legitimate "functional discount" to jobbers performing valuable services. Instead, this case comes to this Court on a clear record establishing that Texaco was granting a lower price to favored jobbers unrelated to any significant functions performed by them. The record below proved conclusively that the discount given the favored jobbers resulted in lower prices to Hasbrouck's competitors and denied Hasbrouck equality of competitive opportunity in violation of the Act.

[3] A "dual distributing" wholesaler is one who functions both as a wholesaler and as a retailer and, thus, competes with independent retailers such as Hasbrouck.

[4] Texaco separately reimbursed the favored jobbers for delivery costs by a hauling allowance, and the trial court excluded the hauling allowance from its calculation of the price difference. 634 F.Supp. at 38, n. 5. No serious attempt beyond identifying vague functions like "marketing and advisory" functions performed by the favored jobbers was made by Texaco to justify the discount in the court below. *Id.*

This case, therefore, is on all fours with *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). Texaco, however, has attempted to distinguish *Perkins* based on Hasbrouck's status as a retailer, the favored customers' status as jobbers and a claimed right to be free, under the Act, to give functional or trade discounts. In *Perkins*, the plaintiff was an integrated jobber claiming injury to its retail stations as the result of lower prices charged by competing retail stations served by a competing jobber who received lower wholesale prices. Those discounts were passed on to its retail customers through several levels of distribution. The factual distinction between this case and *Perkins*, therefore, is a distinction without a difference.

Economists and others generally draw a distinction between "functional discounts" and "trade discounts." A functional discount is a discount offered by a manufacturer to a purchaser for assuming and performing a function that would otherwise be performed by the manufacturer. A trade discount is a discount given to purchasers on the basis of the level of trade at which they operate. A trade discount depends solely on to whom the purchaser resells; it is entirely independent of marketing functions performed by the purchaser.

Based on the findings below, therefore, the discounts were not functional in nature, but rather, trade discounts having no necessary relation to any functions being provided by the favored jobber-retailers.

The discounts directly and inevitably resulted in serious competitive injury to Hasbrouck at the retail level of the market in violation of the Act and were a form of economic price discrimination contrary to good economic policy generally.[5]

The repeated characterization by Texaco and its *amici* of the kind of discount given in this case as a "functional" discount ignores the record evidence that the discount bore no relation to the performance by the favored jobbers of discrete functions. Quite simply, it was found below that the jobbers undertook no "functions" other than delivery functions for which they were separately compensated. The record below further demonstrates that Hasbrouck repeatedly informed Texaco that the trade discounts resulted in arbitrary discounts to competing retailers who could sell gas at or below the DTW price Texaco charged Hasbrouck. Consequently, Texaco knowingly discriminated in price among competing retailers over a sustained period of time and clearly denied Hasbrouck the equality of competitive opportunity that the Act was expressly designed to afford. Given the record evidence, this case should be resolved on the basis

[5] The use of trade discounts rather than functional discounts is often contrary to economic efficiency and can freeze outmoded and inefficient methods of distribution. There is no necessary relation between the trade discount and any functions provided by the recipient of the discount. Vertical integration forward or backward to more efficiently distribute goods can be frustrated where discounts are not related to the assumption of functions or efficiencies realized by vertical integration. Celnicker & Seaman, *Functional Discounts, Trade Discounts, Economic Price Discrimination and the Robinson-Patman Act*, 7-8 (1988)(unpublished manuscript on file with the Solicitor General of the United States), (*forthcoming Utah L. Rev.*, Nov. 1989).

that only trade discounts are involved which have no relationship to any of the defenses included in the Act.

Traditional functional discount analysis leads to the same conclusion. The Act, either explicitly or implicitly, provides at least five "defenses" which could have absolved Texaco of liability: (1) If the discounts were true functional discounts, Hasbrouck would not have been able to show that the discounts "caused" competitive injury. Proof that the lower price to favored customers reflected the assumption of costs normally borne by Texaco would defeat proof that the price difference caused Hasbrouck's injury of the sort proscribed by the Act;[6] (2) If the favored customers did absorb legitimate costs and the functional discount reasonably reflected the assumption of costs, any damages suffered by Hasbrouck would not be damages of the sort the antitrust laws were intended to prevent;[7] (3) An absence of "competitive injury" has also been recognized where the discounts are generally and practically available to competitors of the favored customer;[8] (4) If the discounts reflected legitimate costs absorbed by favored jobbers, Texaco had an absolute defense of cost justification under the

[6] *See Boise Cascade Corp. v. F.T.C.*, 837 F.2d 1127 (D.C. Cir. 1988).

[7] *See Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982).

[8] *See FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1025-26 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Boise Cascade Corp. v. F.T.C.*, 837 F.2d 1127, 1130 (D.C. Cir. 1988).

proviso to section 2(a) of the Act;[9] and, (5) If the discounts were given to meet competing offers to the wholesalers, Texaco had available the absolute defense of meeting competition under section 2(b) of the Act.[10] However, the courts below found that Hasbrouck did, in fact, suffer injury of the sort proscribed by the Act; that the favored jobbers did not perform any additional legitimate functions; and that, factually, the other defenses were not appropriate.

Texaco and *amici curiae* supporting its position ignore these realities of the record below. Texaco seeks the judicial creation of an absolute defense for "functional" and trade discounts, which Congress itself has refused to create. Rather than deal with the facts of the case, the explicit requirements of the law Congress adopted and the realities of gasoline marketing, petitioner and its *amici* seek a most blatant form of judicial legislation—the judicial creation of an absolute defense for functional and trade discounts in the con-

[9] 15 U.S.C. § 13(a):

> *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery . . .

See United States v. Borden Co., 350 U.S. 460 (1962).

[10] 15 U.S.C. § 13(b):

> *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser . . . was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

See Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983); *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951).

text of a statute where Congress expressly considered and refused to create such a defense.

As originally reported from both the House and Senate Judiciary Committees, the bills which became the Robinson-Patman Act expressly exempted from coverage under the Act any price difference related to the buyer's functional status in the distribution hierarchy. See, H.R. Rep. 2287, 74th Cong., 2d Sess., 8-9 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 5 (1936). This exemption was then deleted from the final bill. Report of the Attorney General's National Committee to Study the Antitrust Law 202-204 (1955). Moreover, the same Congress which adopted the Robinson-Patman Act also amended the Clayton Act prohibition on price discrimination,[11] to eliminate the "quantity discount exemption." This amendment reflected the general concern of Congress with discounts which denied equality of competitive opportunity to small retailers. It has been persuasively argued that

> since Congress elected not to address functional discounts directly in the Act, the le-

[11] The original Clayton Act provided: "[N]othing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, *or quantity of the commodity sold* . . ." Act of October 15, 1914, ch. 323, sec. 2, 38 Stat. 730 (1914). The underlined exemption for quantity discounts was deleted by the Robinson-Patman Act amendment in 1936, reflecting Congressional concern for volume discounts detached from cost savings given large buyers and denied small buyers. The present proviso to Section 2(a) provides: "[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or *quantities* in which such commodities are to such purchasers sold or delivered. . . ."

gitimacy of the practice depends on the absence of anticompetitive effects or the presence of conventional defenses. This is the view adopted by the Federal Trade Commission and the courts.[12]

Congress paid great attention to the problem of functional discounts, seriously considered creation of an absolute defense for functional discounts and expressly refused to include a defense immunizing such a practice. While it may be accurate to claim that Congress did not intend to make illegal all functional discounts, it is also true that Congress did not intend to immunize functional discounts from scrutiny under the general standards of the Act. The United States' attempt to suggest that the failure to include an express exemption for functional discounts should be read as evidencing a Congressional intent to do so has a Catch-22 ring to it. Brief for the United States and the Federal Trade Commission as *Amicus Curiae* supporting Petitioners, at 23-25. Functional discounts, like other price differences which may or may not generate the prohibited anticompetitive effects at the primary, secondary or other level of a market, must be evaluated in terms of whether the requisite anticompetitive effect can be shown or whether there is a "meeting competition" or "cost justification" defense available in the circumstances of a particular case.

The lower courts in this case followed the express requirements of the statute and the policies which gave rise to it. They walked the fine line between

[12] ABA Antitrust Section, 1 The Robinson-Patman Act: Policy and Law 58 (1980).

improperly legislating an absolute defense for functional discounts (as demanded by Texaco and some *amici*) and creating a standard which would make impossible or impractical the legitimate use of functional discounts where they are a part of the competitive process in a particular industry.

The lower courts were aware that at one end of the spectrum of potential uses of functional discounts are those cases where a seller gives different prices to those providing different functions in the marketing of its goods and the difference in price reasonably approximates the cost of providing the functions. At the other of the spectrum are those cases where a price difference is given for no particular services and the claimed difference in function is fictional and a device for circumventing the prohibitions of the Act. In sorting through the facts of this case, it is apparent that this case is much closer to the latter end of the spectrum, an arbitrary trade discount, and not a legitimate functional discount, as the lower courts determined.

The lower court adopted a two-part test which distinguishes between legitimate and illegitimate functional discounts. The court held unlawful only those discounts (1) which are not cost-based and (2) are passed on to the jobber's retail customers. The first part of the test is similar to that adopted by the Federal Trade Commission in the leading case of *Doubleday & Co.*:[13]

> Where a businessman performs various wholesale functions, such as providing stor-

[13] 52 F.T.C. 169 (1955).

age, travelling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. . . .

On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved should he qualify for a compensating discount. The amount of the discount would be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the goods for which he performs it.[14]

In this case, Texaco was given every opportunity over more than a decade of litigation to show that the amount of the discount was "reasonably related" to the expenses assumed by the buyer. Texaco not only failed to do so, it refused to do so on the ground that the courts should create the same exemption for "functional discounts" that Congress refused to enact.

The second part of the test adopted below, that the plaintiff prove that all or a part of the discount was passed on by the favored jobbers, is also consistent with the restrictive test adopted by the majority in *Boise Cascade Corp. v. F.T.C.*[15] In that case, the circuit court moved away from this In that case, the circuit court moved away from this Court's holding in *F.T.C. v. Morton Salt Co.*[16] that:

[14] 52 F.T.C. at 209.

[15] 837 F.2d 1127 (D.C. Cir. 1988).

[16] 334 U.S. 37 (1948).

It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.[17]

In *Boise Cascade*, the majority opinion permitted evidence that the price difference allowed Boise did not adversely affect competition to rebut the presumption that a substantial price difference over a sustained period of time necessarily injured competition within the meaning of the Act.

Texaco's practice is illegal under the test of *Morton Salt* since there was a substantial price difference allowed over a sustained period of time. Texaco's practice is also illegal under the more restrictive test of *Boise Cascade* since it was affirmatively shown that the price difference was passed on to retailers competing with Hasbrouck[18] and that the resulting discrimination injured competition and caused Hasbrouck antitrust injury.[19] Moreover, and as noted in the United States' *amicus* brief on the petition for certiorari stating that this case did not "merit review,"[20] the circuit court's opinion does not require

[17] 334 U.S. at 50.

[18] 842 F.2d at 1039-40.

[19] 842 F.2d at 1040-41.

[20] Brief for the United States as *Amicus Curiae* on Petition for Writ of Certiorari at 6 (May, 1989).

that Texaco monitor its jobbers' pricing but only holds Texaco liable for knowingly granting a trade discount injuring competition.

The decisions below strike the balance required by the Act between permitting legitimate functional discounts that reflect cost saving services provided by favored jobbers and discouraging unjustified price discrimination through trade discounts that are unrelated to any legitimate cost savings provided by the favored jobbers.

Consequently, given the facts in this case; the nature of competition in the gasoline marketing business; the express language of the Act; the failure of Texaco to assert successfully defenses available to it or to negate Hasbrouck's evidence of causation; and the absence of evidence showing the favored jobbers performed any functions justifying the discount; this Court should affirm the Ninth Circuit's decision.

CONCLUSION

What both Texaco and the United States seek is the opening of wide loopholes, through which any supplier can march, simply by establishing mechanically-defined classes of buyers that do not provide any legitimate function for the discount granted. This Court should not countenance such a judicial repeal of provisions of the Act which are crucial to the competitive viability of efficient small businesses.

Respectfully submitted,

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Dated: September 6, 1989

MOTION FILED
SEP 6 1989

(27)

87-2048

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TEXACO INC.,

Petitioner,

-v.-

RICKY HASBROUCK, d/b/a

RICK'S TEXACO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF SERVICE STATION DEALERS OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF THE POSITION OF RESPONDANT

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September 6, 1989

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MOTION OF SERVICE STATION DEALERS OF AMERICA FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Pursuant to Rule 36 of the rules of this Court Service Station Dealers of America move This Court for Leave to File an Amicus Curiae Brief. Leave to File was obtained from Counsel for Respondant, however Leave to File was sought from Counsel for Petitioner but was not granted.

INTEREST OF AMICUS

The SSDA is uniquely postured in this case. It is the voice of America's sixty thousand independent retail service station dealers. It consists of forty-three state and regional dealer associations. The interest of SSDA in this case is twofold.

On the one hand, the plaintiffs in this case are former service station dealers who were forced from their business as a result of the price discrimination. Many of SSDA's members are similarily situated retailers in that they are directly supplied by a major oil company yet must compete with similar operations that are supplied by or even operated by wholesaler/distributors known in the trade as "jobbers".

At the same time, thousands of SSDA's members are supplied by jobbers. These dealers could face competitive harm if the allegations of the wiping out of functional discounts were true. SSDA believes that the Robinson-Patman Act specifically authorizes legitimate functional discounts and herein proposes a

standard by which such discounts can be judged.

On the other hand, we cannot live with a rule such as that advocated by Petitioner, which would in effect immunize a petroleum refiner from liability under Section 2(a) of The Act.

SSDA believes that the twin perspectives it brings are not represented in the case.

The SSDA, as a national organization, must be cognizant of the interests of all of its members, including both the direct buying retailer who are the disfavored purchasers in this case as well as the distributor supplied dealer who were the favored purchasers in this case.

The SSDA also wishes to bring to The Court's attention key legislative history as well as the existence of

other important statutes and marketplace conditions affecting the petroleum industry. Accordingly, Leave to File the enclosed brief is sought.

Respectfully submitted,

D. G. Daskalopoulos

Dimitri G. Daskalopoulos

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INTEREST OF THE AMICUS

The Service Station Dealers of America is a trade association headquartered in Washington, D.C. It is a federation of 43 state and regional gasoline retailer associations that serve as the voice of America's 60,000 independent gasoline dealers.

The issues presented are of vital importance to SSDA members.

Many SSDA members are directly supplied by refiners, who also supply wholesaler distributors known as jobbers. Thousands of SSDA members are supplied by jobbers, putting SSDA in a unique position in this case.

On the one hand, the Petitioner argues for a rule that would *per se* immunize refiners from liability under

Section 2(a) of the Robinson-Patman Act, irrespective of the competitive consequences.

On the other hand, a rule that unduly limits legitimate functional discounts would harm the SSDA members served by distributors.

Nevertheless, SSDA believes the judgment below should be affirmed.

SUMMARY OF ARGUMENT

1. Amicus believes that the facts of the case do not comport with the issue briefed by petitioner, accordingly, the writ of certiori should be dismissed.
2. The language, legislative, and purposes of the Act clearly reject the contention of Petitioner that a manufacturer can never be liable under Section 2(a) for granting a

"uniform" functional discount irrespective of competitive harm.

3. The basis for a legitimate "functional discount" exemption to Robinson-Patman liability must be found in the statute itself. The only basis is the cost justification defense, therefore any functional discount must bear a reasonable relationship to costs the grantor would not have to bear.

4. Respondants proof of damages fully complied with the competitive injury requirements of Section 2(a) and the "Robinson-Patman" injury requirements of Section 4 of the Clayton Act.

ARGUMENT

I. THE FACTS OF THE CASE DO NOT PRESENT THE ISSUES RAISED BY PETITIONER

Amicus agrees with Respondant that the facts of the case do not present the issues briefed by Petitioner, and that the writ of certiorari should be dismissed.

The case does not present a garden variety "functional discount", equally available to all wholesalers.

In effect, the Court is being asked for an advisory opinion on issues that simply do not fit the facts of the case.

Amicus adopts the arguments of Respondant herein by reference and urges the Court to dismiss the writ.

II. A DISCRIMINATION IN PRICE BETWEEN WHOLESALERS AND DIRECT BUYING RETAILERS MAY GIVE RISE TO A SECTION 2(a) VIOLATION

A. The Plain Language of the Statute

The statute plainly indicates that a manufacturer can be found liable under Section 2(a) where a functional discount causes competitive harm, thus Petitioner's claim of *per se* immunity must be rejected.

Petitioner would have this Court submit to a tyranny of labels, whereby it could insulate itself from a 2(a) claim simply by declaring that the favored purchaser is a wholesaler, irrespective of whether or not the "wholesaler" actually performed the functions of a wholesaler.

In a 2(a) case, the critical inquiry is whether the price discrimination may affect competition; not the functional level of the purchasers.

To begin with, the plain language of the statute states, in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchases of commodities in like grade and quality . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent

competition with any person who either grants or knowingly receives the benefit of such disc.imination, or <u>with customers of either of them</u>."

It is unequivocally clear from the language that the focus is on the "effect of such discrimination."

Moreover, it is also clear that phrase "may be to substantially lessen competition or tend to create a monopoly in any line of commerce" means exactly what it says.

This language was part of the original Section 2 of the Clayton Act of 1914.

It contains no functional limitations; it simply requires a showing that as a result of the challenged price discrimination, there may be a substantial lessening of

competition in any significant market.

In effect, Petitioner's argument is the same argument rejected by this Court in <u>George Van Camp & Sons Co</u>. v. <u>American Can</u>. <u>Co</u>. 278 U.S. 245 (1929).

In that case, The Court rejected an interpretation of the "in any line of commerce" language that would have confined it to the particular line of commerce in which the discriminator is engaged, stating:

> "The phrase is comprehensive, and means that if the forbidden effect or tendency is produced in <u>one</u> out of all the various lines of commerce, the words 'in any line of commerce' literally are satisfied." 278 US at 253.

The language is clear -- a price discrimination causing the requisite competitive injury is unlawful

regardless of the functional level in the favored purchaser's chain of distribution at which the competitive harm is first felt.

Finally, the plain language of the statute is also clear that where the effect of the price discrimination is to injure, prevent or destroy <u>competition</u> with either the grantor or recipient of a discrimination in price <u>or</u> with the <u>customers</u> of the grantor or recipient, liability may attach. See, e.g., <u>Falls City Industries, Inc</u>. v. <u>Vanco Beverage Inc</u>. 460 US 428 (1983).

Thus as stated by this Court in <u>FTC</u> v. <u>Fred Meyer Inc</u>. 390 US 341, 356-57 (1968):

"When Congress wished to expand the meaning of competition to include more than resellers

operating on the same functional level, it knew how to do so in unmistakable terms. It did so in Section 2(a) of the Robinson-Patman Act."

The central inquiry is the _effect_ of the price discrimination.

That a "functional discount" may have the requisite effect is also clear.

As one commentator explained:

". . . Though the functional classes receiving the discounts might operate at different distributive levels, as do wholesalers and retailers, _the customers of one class might be in competition with the members of the other_, as retailers who buy from wholesalers are in competition with retailers who buy

directly from the manufacturer; and the relative size of the functional discounts might be such as to affect the relative opportunity of those customers. . . Regardless of the purposes that may underlie the discount structure . . . A discrimination is unlawful if all or a part of a disfavored class of customers may be injured.

C. Edwards, The Price Discrimination Law, 287 (1959).

Petitioner's argument is contrary to the plain language of the Act.

B. The Legislative History

This Court has repeatedly made clear that it will not "judicially legislate", that is to adopt through judicial interpretation a reading of a

particular statute specifically rejected by Congress. J. Treutt Payne v. Chrysler Motors Corp. 451 US 273, 276 (1981).

It is important to note that the per se exemption advocated by Petitioner was contained in both the House and Senate versions in what became the Robinson-Patman Act in the 74th Congress (HR 8442, 74th Cong. 1st Session. June 11, 1935; S.3154 74th Cong., 1st Sess., June 26, 1935).

The language was deleted by Congress, and consistent with J. Treutt Payne, this Court should not judicially legislate it.

Simply put, the legislative history shows that Congress did not intend to give wholesalers and their customers unjustified benefits from price discriminations that disfavored

direct buying retailers. See, generally, J. Palamountain, The Politics of Distribution, 228-30 (1955).

Petitioner's arguments are also undercut by the subsequent failure of Congress to enact "functional discount" amendments despite repeated efforts to do so.

Thus, Petitioner's reading of the statute conflicts with both the plain language and the legislative history of the Act.

C. The Purposes of the Act

"The history of the Act is both interesting and colorful, and seems clearly to indicate that the Act was drafted and enacted in a concerted effort to retain the small retailer and its supplier on

the American commercial landscape." Calvani, Functional Discounts Under the Robinson-Patman Act. 17 Boston College Industrial & Commercial Law Review 543 at 548 n. 22 (1976)

Indeed, the preservation of small business has been expressly recognized by the Court as the primary concern of the Act. See, e.g., FTC v. Morton Salt Co. 334 U.S. 37, 49. (1948), Cf. Business Electronics v. Sharp Electronics ____US at ____ (1988) (per se illegality of vertical restraints would create incentive for vertical integration by manufacturers, hardly conducive to fostering creation and maintenance of small business).

In this case, the "mom and pop" retail dealers were harmed by Texaco's discriminatory pricing.

If the Court were to adopt Petitioner's contentions, then <u>any</u> "functional discount" irrespective of size, irrespective of any justification and irrespective of any competitive harm that may occur would not be actionable under Section 2(a). The results would be catastrophic for the very "mom and pop" retailers Congress sought to protect in enacting the Robinson-Patman Act.

A prime example is the conduct of the Petitioner in the retail gasoline market. According to Congressional testimony by the Petroleum Marketer's Association of America (supporting Petitioner as an Amicus in this case) Texaco specifically told their members to "ax dealers to profit and company-operated your stations, as we, Texaco, are doing." Hearings on H.R.

5023; Petroleum Marketing Practices Act Amendments, Before the Committee on Energy and Commerce, 98th Cong., 2nd Sess., May 22 and June 21, 1984, Serial No. 98-159 at p. 73.

By giving sizable, unjustified discounts to wholesalers, a refiner such as Texaco makes it impossible for small retailers such as Hasbrouck to stay in business. The net result would be that, as happened here, the dealers would give up the stations, and the company would then integrate forward by operating the stations themselves.

In other Congressional testimony it was revealed that Petitioner as well as other refiners in 1986 had instituted "functional discounts" between direct buying retailers and wholesalers ranging from 13 to 27

cents per gallon, harming direct supplied dealers. Hearing on H.R. 3824, To Amend The Clayton Act, Before the Committee on Small Business, 99th Cong. 2nd Sess., April 17, 1986 at pp. 78-123.

While it has been argued by some Amici in this case that such action is "economically irrational," we respectfully submit that that analysis is superficial and misleading.

A manufacturer may, like Texaco, want to increase its profits by forward integration, or may simply desire to have greater control over its retail network.

Even if one accepts, arguendo, Petitioner's statement of the case, that it involves only a uniform wholesaler discount equally available to all purchasers, clearly, the

manifest purposes of The Act require rejection of the contention that a manufacturer is per se immune from liability under Section 2(a).

Amicus would also point out that the policies of other Congressional enactments would also be affected.

For example, The Petroleum Marketing Practices Act, 15 USC 2801-2841 specifically prohibits termination of a dealer or jobber franchise or non-renewal of a franchise relationship unless the franchisor can affirmatively prove that grounds within the Act exist.

Through discriminatory pricing of the type encountered herein, a franchisor can sell to a dealer at a price which would not enable even the most efficient dealer in the world to survive. The net result is that the

dealer would be economically evicted from the station, as Hasbrouck and others were, in direct contradiction of PMPA's prohibition of termination and non-renewal.

Simply put, the fostering and maintenance of small business, which is the primary goal of the Robinson-Patman Act would be severely damaged by adoption of Petitioner's rule.

Small retailers could be wiped out by customers of favored wholesalers who receive discounts that would be unbounded in scope, and unrelated to any cost justification.

This result is completely at odds with the purposes of the statute, and should not be countenanced by this Court.

III. FUNCTIONAL DISCOUNTS MUST BE COST JUSTIFIED

Amicus believes that any functional discount must bear a reasonable relationship to the costs that the giver of the discount would otherwise bear.

As we have seen, Congress expressly did not include functional discount language in the statute.

Significantly, even the committee report on the versions of the bill that contained the "functional discount" defense stated that a cost basis was an essential component of such discounts.

Legitimate functional discounts must have a basis in the statute.

The only basis in the statute is the Section 2(a) cost justification provision.

Amicus strongly disagrees with the notion advanced that sellers would have to closely monitor the costs of their wholesalers.

First of all, the seller must have a reasonable idea of the costs of the functions performed by wholesalers, otherwise they could not make a rationale decision as to whether to use wholesalers, or to engage in distribution themselves.

This is particularly true in the petroleum industry where major oil companies frequently act as distributors.

The key inquiry in functional discount cases has always been whether the discounts are reasonably related to the cost savings to the supplier. See, e.g., Mueller Co. 60 F.T.C. 120 (1962) aff'd 323 F2d. 44 (7th Cir.

1963), cert. denied 377 US 923.

The ability of the wholesaler to perform a function less expensively than the manufacturer, combined with the right of the manufacturer to grant a discount based on its costs both rewards and promotes efficiency. The wholesaler profits from efficiency, not a subsidy. Allowing an arbitrary functional discount does not promote efficiency.

A second requirement is that "wholesaler" actually perform the function it is being compensated for.

To hold otherwise would exhalt form over substance, and allow nominal wholesalers to receive discounts based solely on the labels attached to them by their suppliers.

It is significant to note that the Petroleum Marketing Practices Act

protects jobber-distributors from termination of their franchises. And legislative history is clear that one who actually performs the functions of a jobber is included within the Act's definition of "distributor" 15 USC 2801 (6), See, 123 Cong. Record p. H16358 (remarks of Rep. Dingell) June 6, 1978.

Thus, we believe that the appropriate standard for legitimate functional discounts is that they must be reasonably related to the cost savings to the supplier, and must compensate the wholesaler for services actually performed.

IV. THE NINTH CIRCUIT CORRECTLY FOUND THAT THE REQUISITE COMPETITIVE AND "ROBINSON-PATMAN" INJURIES WERE PROVED BY RESPONDANTS

A. Section 2 (a)

The 9th Circuit first discussed

the requirements of Section 2(a), noting that 2(a) requires a plaintiff to show only, "a reasonable possibility that a price differential may harm competition." 842 F.2d at 1041.

Petitioner and various Amici assert reversible error in the application of the Morton Salt inference of harm to competition from evidence of harm to competitors, in the Ninth Circuit's analysis of Section 2(a). Their primary contention is that because the Respondants operated at different functional levels than the favored buyer, the inference should not apply.

As made clear by this Court in Falls City, Industries Inc. v. Vanco Beverages 460 U.S. 428 at 434-35, the fact that the favored and disfavored

buyers are not in direct competition does not render Morton Salt inapplicable.

Moreover, even a cursory reading of the opinion below shows that the Morton Salt inference was not the basis for finding that Section 2(a)'s competitive injury requirement was satisfied. The Court specifically noted that Hasbrouck and the other plaintiffs produced "considerable specific evidence supporting the conclusion that Texaco's pricing policies adversely affected competition." 842 F.2d at 1041.

To the extent the jury and the 9th Circuit relied on the inference it was jutified, and in any event, Petitioner lost on the factual issue of causation.

B. Antitrust Injury Under Section 4

As the 9th Circuit correctly noted, section 2(a) is satisfied where there is proof that competitive injury _may_ result, and injuctive relief may issue; however, recovery of damages requires a showing of _actual injury_ and _causation_.

Contrary to the arguments of some Amici, the _Morton Salt_ inference played _no role_ in the 9th Circuit's analysis.

The question presented here is the application of the teachings of _J. Truett Payne v. Chrysler Motors Corp._ 451 US 557 (1981) to the facts of this case, and the application of the concept of "antitrust injury."

It is critical to realize that application of the term "antitrust

injury" is a misnomer in this case.

This Court has already held that the Robinson-Patman Act is not an antitrust law as the term is used in Section 4 of the Clayton Act. Nashville Milk Co. v. Carnation Co. 355 U.S. 373, 375-36 (1968). It has been consistently recognized that The Act, "Consistent with its origins was drafted not as an antitrust law . . . and was designed to protect classes of business." U.S. Dept. of Justice Report on The Robinson-Patman Act at p. 210 (1975).

Simply put, in J. Truett Payne the Court interpreted the injury requirement of section 4 (a) in a comprehensive sense to require that (1) the injury was in fact caused by the violation and (2) that the injury was of the kind the Robinson-Patman

Act was designed to prevent and flows from the violation.

Thus, J. Truett Payne stands for the proposition that a Robinson-Patman plaintiff must show injury to him or her self as a result of a price discrimination, precisely what the Fifth Circuit did on remand. See, Chrysler Credit Corp. v. J. Truett Payne Co. 670 F.2d 575, 580 (cert. denied. 459 U.S. 908 (1982) See, generlly, Areeda and Hovenkamp, Antitrust 1988 Supplement Section 340.5, (noting that a broader interpretation would go far beyond the issue presented and the language of the opinion.)

The Robinson-Patman Act was specifically concerned with intrabrand as well as interbrand competition and had as its prime goal the fostering

and maintenance of small business.

As the 9th Circuit noted there was substantial direct evidence of "Robinson-Patman" injury, including substantial evidence of lost sales and profits, testimony of former customers of the disfavored retailers, and Petitioner's knowledge of deleterious effects, 842 F.2d at 1043, 44, thus satisfying the injury requirement.

CONCLUSION

The verdict below should be affirmed.

Respectfully submitted,

Dimitri G. Daskalopoulos

Dimitri G. Daskalopoulos

Counsel of Record

CERTIFICATE OF SERVICE

I, Dimitri G. Daskalopoulos, a member of the Bar of this Court, hereby certify that on thei 6th day of September 1989, three copies of the Motion for Leave to File a Brief Amicus Curiae in the above titled case were mailed, first class postage prepaid, to counsel for petitioners, and to counsel for respondents, as listed below. I futher certify that all parties required to be served have been served.

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